

superintendent of construction told them that the home was sold to them two months earlier and that B & E rushed its construction of the house in an attempt to have it completed within one year from the date of the signing of the agreement in May of 2000.

As a result of this rushed construction and fraud, there were numerous leaks from pipes, the roof, and other areas in the house. Numerous "upgrades" sold to the petitioners by B & E for their home were either scratched or chipped, installed in the wrong place, sometimes with the wrong materials or with materials which were inferior in quality to the materials B & E promised would be installed. The petitioners' 90-day walk-through inspection conducted on September 26, 2001, produced a discrepancy checklist of *over 175* instances of shoddy, inferior workmanship; the installation of inadequate or inappropriate material; and blatant design defects. Broken, chipped wood; substandard drywall, molding, caulking and painting; numerous leaks; missing wood; water faucets switched from cold to hot; a missing pipe cover that required removal of a bathroom sink and which caused mold; removal of tile after the sink removal; relocation of the basement toilet due to code-related violation which took five days for its relocation; three missing medicine cabinets; the main entrance, powder room, and closet doors were not work properly; and countless other examples of inadequate or negligent finish work left the unmistakable inference that there had been a systemic breakdown in the supervision of the construction of this house.

On November 30, 2001 and March 13, 2002, after B & E had attempted to repair some of its faulty construction, the petitioners wrote B & E detailing the items which still needed to be corrected and repaired as well as many other concerns describe din this petition.

The petitioners also did not receive "upgrades" for which they had paid, e.g., 9-foot basement walls, etc. Nor did they receive a home consistent with B & E's own specifications, i.e., the sub-flooring was stapled rather than nailed and/or screwed down; the floor joist system was dramatically deficient—and sometimes completely absent—producing noises/squeaking upon any movement; and there were no 9-foot ceilings. The promised Radon mitigation system *was never installed and then this fact was concealed from the petitioners*. The basement sump pump was defective producing a toxic smell which had to be remedied by the petitioners themselves.

In addition, the basement bathroom had leaks and there were numerous other leaks from sinks, pipes, and the roof, producing unhealthy mold in the house and causing metal to be rusted. The "upgraded" fireplace was mistakenly installed near the stairway; the "upgraded" granite counter tops were chipped and defective; the "upgraded" ceramic tiles in the kitchen were cracked causing dust. The air conditioning was broken; the "upgraded" main Oak stair was in code violation with missing carpet, causing Mrs. Craig to almost fall down at least twice; the hardwood floors were not the quality product which B & E advertised and for which the petitioners paid extra; missing piece of carpet pads under the Basement carpet in several areas that requires to lift the entire carpet for installation of missing pads; one of walls in the back yard is too low (code-related violation). B & E refused to fix the stated problems and many other problems not listed here. The "upgraded" kitchen island granite slab was too small which required its replacement; and the "upgraded" kitchen granite island was installed near the stove which required relocation.

As for the home's landscaping, the petitioners

claimed that huge slopes still remained in the front, side, and back yards and that B & E's installation of the drainage system was faulty causing the landscape to be "washed out." Mrs. Craig ended up in the emergency room for several hours due to severe breathing problems caused by an allergy reaction when she attempted to help her spouse correct the washed out landscaping which B & E refused to fix. In addition, the utility poles were installed above ground instead of below ground.

In all, the petitioners asserted that B & E ordered and installed the wrong materials; denied them certain "upgrades" for which they paid and to which they were entitled; charged them for other "upgrades" for which other homeowners did not pay; failed to provide them with materials and workmanship that other homeowners received; and created new damage during the course of some attempted repairs and then refused to fix the new damage. They requested an additional walk-through of their property before the scheduled one-year walk-through in order to address these problems but B & E refused this request.

When B & E still refused to repair these itemized problems, the petitioners found it necessary to write B & E once more on March 13, 2002, prior to the final walk-through, reiterating with precision the "endless" construction problems, B & E's unfair and unequal treatment, its refusal to correct the problems which they had already identified and restating their request to B & E to address the problems. The petitioners encountered physical and emotional problems by the ongoing inability of B & E to respond to the problems in their home. Specifically, the mold, dust and dirt associated with water leakage and construction defects; the absence of a radon mitigation system when radon levels were four times beyond healthy levels; the smell caused by the faulty

sump pump; the dust particles from the cutting and cracking ceramic tiles; and the work caused by the replacement of the kitchen island and the continued presence of workers in the house for extended periods of time have left Mrs. Craig with severe emotional distress, severe allergic reactions (she almost died due to breathing problems), a precancerous growth which required surgery, a persistent cough for almost two years, and a noticeable loss of hair.

As the Mrs. Craig concluded in her letter to B & E:

I did not receive equal opportunity from Basheer and Edgemoore. Since July of 2000, I have suffered with stress and illness because of...problems with the house. My request was denied in selecting the model [of house] I wanted. My request was denied to obtain the lot that I wanted. My request was denied for the company to build the wall to reduce the slope of the backyard, to avoid accidents from people falling down, and to potential flooding; my request was denied for the company to reduce the slope on the side and front yard. And my request for the company to fix [the] many problems as we (myself and my spouse) stated in two walks-through was denied.

Instead of responding to the petitioners, B & E appeared at the one-year walk-through on May 3, 2002, and without any notice to petitioners refused to conduct the inspection unless the petitioners waived in writing all their rights under B & E's Home Warranty. The petitioners refused to do so and presented B & E with a punch list of 62 separate construction defects prepared by a certified home inspector. B & E declined to consider this punch list and refused to perform any more repair work



on the petitioners' home.

Subsequently, the petitioners discovered that B & E's faulty installation of the floor joist system, a pervasive, fundamental defect which continues to cause repeated cracking of drywall and tilting, and noises/squeaking upon movement throughout the home, was not in conformance with the architectural drawings it submitted to Fairfax County. Nor did B & E install the Radon mitigation system as promised; ***and it took affirmative steps to conceal this important fact from the petitioners*** even though measured Radon levels are four times the maximum allowable safe levels as established by the EPA.

Furthermore, the petitioners commissioned home inspections on May 15, 2003, June 17, 2003, and December 6, 2004. These serial inspections confirmed the systemic failure by B & E to construct the petitioners' home in a safe and workmanlike manner(App. 32-48). Besides identifying 174 separate failures by B & E to adhere to acceptable standards in home building, the certified home inspector found ***over 130 building code-related defects*** in the petitioners' home(App. 34-48).

Faced with B & E's continued refusal to remedy any of these code-related defects, indeed any of the identified problems at all, the petitioners began a civil action against B & E and its partners in the Circuit Court of Fairfax County(App. 4-31). According to their allegations, amended on August 16, 2004, B & E is a Virginia general partnership which in its advertising, marketing and operation, holds itself out to the petitioners as well as to the general public as an entity which specializes in the construction, sales and financing of residential homes in suburban Virginia(App. 5-7). Its partners in this enterprise consist of at least: the respondent Diane Cox Basheer Communities, Inc., a

Virginia corporation with a fictitious trade name of Diane Cox Basheer Communities ("Diane Cox"); the respondent Edgemoore Homes, LLC, a Virginia limited liability company with a fictitious trade name of Edgemoore Homes ("Edgemoore Homes"); the respondent Basheer/Edgemoore-Southampton, LLC, a Virginia limited liability company operating under the trade name Basheer & Edgemoore ("B & E"); and the respondent Basheer/Edgemoore-Westhampton, LLC, a Virginia limited liability company operating under the trade name Basheer & Edgemoore ("B & E") (App.5-6).

The petitioners further alleged that this partnership among B & E, Diane Cox, and Edgemoore Homes constitutes *a Virginia general partnership by estoppel*, doing business under the trade name of B & E since in their advertising, marketing, construction, sharing of employees, sharing of contractor licenses and their prolific and consistent use of the trade name "B & E," these entities held themselves out to the petitioners and to the general public as purported partners of the general partnership of B & E operating under the trade name of B & E(App. 5-7). Furthermore, in reliance upon Diane Cox and Edgemoore Homes, as well as B & E's holding itself out to them and to the public as a general partnership trading under the name of B & E, the petitioners alleged that they "entered in to a contract with the general partnership" of B & E on May 20, 2000 for the construction of their new home(App. 6-7). As the petitioners further alleged, in subsequent written communications with them of May 24, 2000, April 13, 2001, and May 3, 2001, both Diane Cox and Edgemoore Homes represented themselves as purported partners of the general partnership B & E(App. 7).

Alleging all of the facts already recited in this petition and appending exhibits of the relevant

documents to their pleading, the petitioners then claimed in Count I of their First Amended Motion for Judgment that on May 20, 2000, relying upon the existence of this general partnership of B & E, as well as Diana Cox and Edgemoore Homes, they entered into a contract for the purchase of their new home with the respondent Basheer/Edgemoore-Southampton, LLC, a member of the B & E general partnership(App. 8-17). The contract contained an express one-year Home Warranty by B & E that the home B & E built for them would be free from defects in workmanship and material and that inspections conducted both 90 days and one year after closing would guarantee compliance with this Warranty(App. 15-16). Claiming that they had complied with their obligations under the Home Warranty and that they had timely notified B & E and Diane Cox of certain workmanship, material and design defects in violation of that Warranty, the petitioners alleged that B & E refused to honor its obligations under the Home Warranty by not repairing these defects or by repairing these defects improperly so that more damage was done to their home(App. 16).

In addition, the petitioners alleged that B & E had refused to compensate them for their damages and that it had refused to honor its obligation under B & E's Home Warranty to provide them with an inspection one year after the closing(App. 17). As a proximate result of this failure by B & E to honor the Home Warranty, the petitioners are left with a home which contains 174 separate failures by B & E to adhere to acceptable building standards and which has over 130 building code-related defects(App. 17). They will have to pay more than \$200,000 in order to repair the defects which B & E has refused to repair. The petitioners accordingly sought an award of compensatory damages under the Home Warranty against all of the respondents jointly and

severally as partners of the general partnership of B & E(App. 17).

In Count II, they asserted that Basheer/Edgemoore-Southampton, LLC, Diane Cox, Edgemoore Homes, and B & E violated the Virginia Consumer Protection Act (Va. Code Sections 59.1-196 *et seq.*) when it willfully and intentionally misrepresented to the petitioners their rights under the Home Warranty, refused to perform the work called for thereunder, required the petitioners to waive their rights under the Warranty, refused to accept or respond to the petitioners' listing of defects and then refused to conduct a final walk-through inspection without insisting on a waiver of petitioners' rights(App. 18-19). The net result was a Home Warranty which had absolutely no value to the petitioners(App. 19).

Other violations of the Consumer Protection Act were bottomed on the intentionally misleading statements of the respondents Basheer/Edgemoore-Southampton, LLC, Diane Cox, Edgemoore Homes, and B & E, upon which the petitioners relied, that they could not repudiate the agreement after certain lots were made unavailable to them or when certain models could not be built; that their lot would be flat and private when in fact it was sloped and lacked privacy; that utility lines would be buried when in fact they were installed above ground; that their home would be built with skill, workmanship and the highest quality material when in fact it was built poorly, with many defects and lesser quality materials; that it operated without a contractor's license; when it prematurely delivered the home to the petitioners two months before it was finished; and when it failed to install a Radon mitigation system and then affirmatively concealed this fact from the petitioners(App. 19-20).

Consistent with the Consumer Protection Act, the

petitioners under Count II asked for an award of damages from Basheer/Edgemoore-Southampton, LLC, Diane Cox, Edgemoore Homes, and B & E to compensate them for the difference in value between the home B & E promised and the home it actually delivered to them and for the money they spent in attempting repairs in order to put the home in the condition B & E represented it would be in at the time of closing(App. 20-21). In addition, for each willful violation of the Act, they sought an award of the greater of \$1,000 or three times their actual damages incurred together with their attorney's fees and costs(App. 21) from all the respondents.

In Count III, the petitioners relied upon all of the aforesaid material misrepresentations by Basheer/Edgemoore-Southampton, LLC, Diane Cox, and B & E to allege that but for these willful and deliberate misrepresentations, upon which the petitioners relied, Basheer/Edgemoore-Southampton, LLC, Diane Cox, and B & E would not have been able to make the sale(App. 21-24). The petitioners asked for compensatory damages as well as \$350,000 in punitive damages from all the respondents for this fraudulent inducement, conduct which they characterized as malicious, willful and wanton(App. 24).

The petitioners further claimed in Count IV and V, respectively, that all of the respondents committed actual and/or constructive fraud when they failed to install a Radon mitigation system in the petitioners' home as promised and then took affirmative steps to conceal this important fact from the petitioners even though measured Radon levels were four times the maximum allowable safe levels as established by the EPA(App. 24-28). As a result of this actual and/or constructive fraud, the petitioners alleged that they have been forced to live in a home with unsafe levels of Radon, have been denied



the use and enjoyment of a substantial portion of their home, have sustained severe emotional and mental distress, have suffered monetary losses caused by installing a Radon mitigation system themselves and Mrs. Craig has further suffered physical injury in the course of making these repairs as well as a precancerous growth requiring surgery and a noticeable loss of hair(App. 26;28). They sought compensatory damages from all the respondents in the amount of \$500,000 and punitive damages of \$350,000 together with their costs, expenses and attorney's fees(App. 26;28).

Finally, in Count VI, entitled "Vicarious Liability," the petitioners restated their allegations that B & E is a Virginia general partnership which in its advertising, marketing and operation, holds itself out to the petitioners as well as to the general public as an entity which specializes in the construction, sales and financing of residential homes in suburban Virginia and that its partners in this enterprise consist of the respondent Diane Cox; the respondent Edgemoore Homes; the respondent Basheer/Edgemoore-Southampton, LLC; and the respondent Basheer/Edgemoore-Westhampton, LLC(App.28-29).

The petitioners further alleged that this partnership is a *Virginia general partnership by estoppel*, doing business under the trade name of B & E since in their advertising, marketing, construction, sharing of employees, sharing of contractor licenses and their prolific and consistent use of the trade name "B & E," these entities have held themselves out to the petitioners and to the general public as purported partners of the general partnership of B & E operating under the trade name of B & E(App. 29-30).

The petitioners therefore claimed that all of the individually named respondents were partners of the

Virginia general partnership known as B & E; and that all of the actionable conduct described in their complaint was carried out by these partners of the general partnership of B & E in furtherance of its business(App. 30). Accordingly, they asserted that each of these respondents-partners is jointly and severally liable for the debts of the partnership and for the tortious conduct carried out in furtherance of the partnership's business(App. 30). They sought a judgment of joint and several liability against the respondents Diane Cox, Edgemoore Homes, Basheer/ Edgemoore-Southampton, LLC, and Basheer/Edgemoore-Westhampton, LLC in the amount of \$500,000 for compensatory damages, \$350,000 for punitive damages and for the award of their costs, expenses and attorney's fees(App. 31).

The respondents filed a motion to dismiss, a demurrer and a plea in bar to the petitioners' first amended motion for judgment(App. 3). The thrust of the motions was that the "amorphous" entity described as "B & E" by the petitioners is just a trade name for Basheer/Edgemoore-Southampton, LLC; that B & E is not a legally recognized entity in Virginia against which a judgment could enter in any event; and that since the petitioners' purchase and sale agreement was only with Basheer/Edgemoore-Southampton, LLC, there is no basis in law for claiming that the respondents Diane Cox, Edgemoore Homes, and Basheer/Edgemoore-Westhampton, LLC had a contractual relationship with them and therefore should not be jointly and severally liable for the tortious conduct of this supposed general partnership of B & E. As they saw it, the respondent Basheer/Edgemoore-Southampton, LLC is the *only* entity responsible for the development of the subdivision and the only entity against which the petitioners had a remedy. Furthermore, they asserted that any remedy the

petitioners may have against Basheer/Edgemoore-Southampton, LLC was defined by the terms of the Home Warranty given them incident to the agreement.

The motions came on for hearing in the Circuit Court of Fairfax County, before Williams, J., on December 9, 2004. After hearing the argument of the parties and considering their briefs, the Circuit Court ruled orally from the Bench that the demurrers to Count I would be sustained as to all of the respondents except Basheer/Edgemoore-Southampton, LLC:

...I think that the contract as argued by counsel is definitive. It states who the party is. It does not state it is a partnership, and if there were prior representations that it was a partnership, and paragraph 19 [regarding merger] addresses those prior representations that it was a partnership and they are not made part of the contract.

The contract was signed by the plaintiff. The plaintiff is deemed to know who the contracting party is and—by law, and as a matter of law relies on what the contract says about who the parties are.

*So there is no partnership by estoppel pled here, and I'll sustain the demurrer on that ground.*

As to the substantive breach of warranty allegations, those will, of course, survive against the named partner—the named party.

(Transcript of Hearing, p. 22-24)(emphasis supplied).

The Circuit Court also sustained the demurrers of all the other respondents to Count II's allegations of violations of the Consumer Protection Act because the respondent Basheer/Edgemoore-Southampton, LLC was

the only party to the contract with the petitioners. The motion judge also thought that the petitioners' allegations as to Basheer/Edgemoore-Southampton, LLC on this score were not specific enough to withstand its demurrer and their claim against Basheer/ Edgemoore-Southampton, LLC under Count II was dismissed as well, refusing the petitioners leave to amend their First Amended Motion for Judgment.

Addressing Count III's allegations of fraudulent inducement, the Circuit Court ruled that paragraph 19's merger clause in the agreement bars relief against any of the respondents since the petitioners acknowledged therein that they had not relied upon any other representations outside of this contract. As for the respondents' actual and constructive fraud claims under Counts IV and V based upon all of the respondents' failure to install the Radon mitigation system as promised and then affirmatively concealing this fact from the petitioners, the Circuit Court ruled that there was no causal connection between this alleged failure and the severe emotional and mental distress suffered by Mrs. Craig in spite the physical injury she sustained in the course of making these repairs. Mrs. Craig had severe allergic reactions, a precancerous growth which required surgery, a persistent cough for almost two years, and a noticeable loss of hair. Finally, the lower court determined that the petitioners' Count VI allegations presented merely a theory of liability against all the respondents on the basis of a partnership by estoppel rather than a substantive cause of action; and since it had already ruled that there was no partnership by estoppel on the facts alleged, it dismissed Count VI as well.

A written order reflecting these oral rulings by Judge Williams was entered on December 9, 2004(App. 3). Because the remaining claim under Count I against the

respondent Basheer/ Edgemoore-Southampton, LLC for breach of express warranty was a remedy which would not fix the code violations or compensate the petitioners for the financial, physical and emotional injuries which they had sustained and in order to render the lower court's disposition final for purposes of appellate review, the petitioners moved for the dismissal of Count I(App. 2). The Circuit Court of Fairfax County granted their motion on December 28, 2004(App. 2).

Upon the petitioners' appeal of this final order, the Supreme Court of Virginia summarily affirmed the Circuit Court's decision granting all of the respondents' demurrers in a one-paragraph ruling on June 28, 2005(App. 1).

After obtaining an extension of time from this Court, Thomas, J., the petitioners have now petitioned this Court for the issuance of a writ of certiorari to the Supreme Court of Virginia.

### **Argument Supporting Allowance of the Writ.**

**The State Courts of Virginia Denied the Petitioners Due Process Of Law When They Unexpectedly and Without Fair Warning Repudiated a State Statute Which Recognizes the Liability of a Partnership Created by Estoppel Thereby Denying The Petitioners a Trial on Their Claims That the Respondents, Acting Collectively as a Purported Partnership Under Virginia Law, Breached Their Contract to Build Them Home, Violated the Virginia Consumer Protection Act and Committed Fraud in Doing So.**

#### ***A. Virginia's Recognition of the Liability of a Partnership Created By Estoppel and the***



***Virginia Courts' Repudiation of That Statutory Principle of Liability.***

Since as early as *Hobbs v. Virginia National Bank of Petersburg*, 128 S.E. 46 (Va.1926), the decisional law of Virginia has consistently recognized that a partnership can be created informally by the mere holding out of the partnership to third persons who deal with it as if it were a partnership. *Id.* at 69-70. Thus one who makes or authorizes a statement or representation to a third person that he is a partner, "he is bound thereby to a person to whom the statement or representation was made, and who relied upon it in dealing with the apparent partnership." *Id.* citing *Thompson v. First National Bank*, 111 U.S. 529, 536-537; 541(1884). Moreover, each member of this apparent partnership has the power and authority through his representations to third parties who rely thereon to bind all the other partners of this apparent partnership who consent to the representations to the same extent and in the same manner as though he were a partner in fact. *Id.*

The *Hobbs* Court thus approved of an instruction which told the jury that each member of an apparent or supposed partnership has the authority to bind all the other supposed partners by his acts or contracts in relation to the business of the partnership, including the borrowing of money and the making and delivering of the contracts of the partnership therefor; and as between the partnership and third persons dealing with it in good faith, it is of no consequence whether the partner is acting in good faith with copartner or not, provided the act is done within the scope of the partnership business and professedly for the partnership. *Id.* at 70. *Accord*, *Cullingworth v. Pollard*, 111 S.E. 2d 810, 814-815(Va. 1960); *Cooper v. Knox*, 90 S.E. 2d 844, 847-848(Va. 1956);

*Holloway v. Smith*, 88 S.E. 2d 909, 914(Va. 1955). Compare *B.F. Kennedy v. Dallas Mullins*, 154 S.E. 568, 570 (Va.1930)(lack of agreement *between the supposed partners themselves* destroys any inference of a partnership).

Virginia Code Section 50-73.98, entitled "Liability of a Purported Partner," is the most recent codification of these common law principles of partnership by estoppel. It provides in pertinent part that

(A) If a person, by words or conduct, purports to be a partner, or consents to being represented by another as a partner, in a partnership or with one or more persons not partners, the purported partner is liable to a person to whom the representation is made, if that person, relying on the representation, enters into a transaction with the actual or purported partnership. If the representation, either by the purported partner or by a person with the purported partner's consent, is made in a public manner, the purported partner is liable to a person who relies upon the purported partnership even if the purported partner is not aware of being held out as a partner to the claimant. If partnership liability results, the purported partner is liable with respect to that liability as if the purported partner were a partner. If no partnership liability results, the purported partner is liable with respect to that liability jointly and severally with any other person consenting to the representation....

With these statutory principles of partnership by estoppel in mind, the petitioners unambiguously alleged that this apparent partnership among Diane Cox;

Edgemoore Homes; Basheer/Edgemoore-Southampton, LLC; and Basheer/Edgemoore-Westhampton, LLC, is a **Virginia general partnership by estoppel**, doing business under the trade name of B & E because in their advertising, brochures, letters, letterheads, marketing, construction, sharing of employees, sharing of contractor licenses and their prolific and consistent use of the trade name "B & E" with the petitioners as their customers, these entities all held themselves out as purported partners of a general partnership called "Basheer & Edgemoore" or B & E, regardless of what particular partner signed the agreement for the purchase and sale of their home(App. 29-30). In essence, the petitioners were bringing suit against **the partnerships** with whom they had dealt and upon whom they relied in purchasing their new home. See *Bryant Elec. Co., Inc. v. Joe Rainero Tile Co.*, 84 F.R.D.120, 123 (W.D. Va. 1979).

Since all of these partners committed the actionable conduct in furtherance of partnership business within the meaning of Virginia Code Section 50-73.98, the petitioners alleged that each of them by statute is jointly and severally liable for the debts of the partnership and for the tortious conduct carried out in furtherance of its business(App. 30).

Despite established law in Virginia that upon demurrer such allegations are taken as true and read with every deference to the petitioners, *Ward's Equip. v. New Holland North Am.*, 493 S.E. 2d 516, 518(Va. 1997), the Circuit Court inexplicably and unexpectedly repudiated Virginia Code Section 50-73.98's language recognizing the liability of a partnership created by estoppel and determined that since the petitioners had contracted with one of the partners, the respondent Basheer/Edgemoore-Southampton, LLC, for the purchase of their home, "there is no partnership by estoppel pled here," sustaining

the demurrer on Count I as to all the other respondents.

This ruling carried over to the other five substantive counts of the petitioners' complaint (Counts II-VI) so that none of the respondents, while furthering the partnership business, could be held liable for violations of the Virginia Consumer Protection Act, for fraud in the inducement or for the actual or constructive fraud they committed when they failed to install the Radon mitigation system as promised and then affirmatively concealed this fact from the petitioners or vicarious liability. The Virginia Supreme Court ratified this inexplicable and unexpected ruling with its one-paragraph affirmance.

***B. The Virginia Courts Have Denied the Petitioners Due Process of Law.***

With "very rare exceptions," *Adams v. Robertson*, 520 U.S. 83, 86(1997) quoting *Yee v. Escondido*, 503 U.S. 519, 533(1992), this Court has adhered to the rule in reviewing state court judgments under 28 U.S.C. Section 1257(a), that it will not consider a petitioner's federal claim unless it was either addressed by or properly presented to the state court that rendered the decision it has been asked to review. *Id.* As in *Adams*, the State's highest appellate court has not expressly addressed the constitutional question raised by the petitioners here to justify the grant of a writ of certiorari.

However, the federal guaranty of due process, as applicable to the petitioners under the fourteenth amendment, extends to state action through its judicial as well as through its legislative, executive or administrative branch of government. *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, 680 (1930). With any matter before it, this Court's

present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense,—whether [they have] had an opportunity to present [their] case and be heard in its support...[W]hile it is for the state courts to determine the adjective as well as the substantive law of the State, they must, in doing so, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.

*Id.* at 681-682 (Brandeis, J.) (footnotes omitted).

Thus in *Bowie v. City of Columbia*, 378 U.S. 347, 352-355 (1964), this Court on its own inquiry determined that regardless of the petitioners' failure to raise properly the federal issue in State court, South Carolina's highest court in its decision had retroactively broadened its interpretation and application of a state trespass law so far beyond what a "fair reading" of the state law would permit as to constitute a denial of due process. *Id.* It held that "[w]hen a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law 'in its primary sense of an opportunity to be heard and to defend [his] substantive right.'" *Id.* at 354 quoting *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. at 678.

Other decisions by this Court confirm the principle that where State trial and appellate courts have interpreted their own State statute in a way that was unforeseen, "unexpected," or "indefensible by reference to



the law which had been expressed prior to the conduct in issue," in order to deny the state-court litigant an opportunity to be heard on the substantive right affected, it violates that litigant's due process rights regardless of whether he has timely or properly raised the federal issue in State court. See, e.g., *Bush v. Gore*, 531 U.S. 98, 115(2000)(Rehnquist, C.J., concurring)(State court's interpretation of its own election laws impermissibly distorted them beyond what a fair reading required); *Wright v. Georgia*, 373 U.S. 284, 289-291(1963)(breach of peace statute newly construed; violation of due process); *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 457-458(1958)(state court's unexpected resort to new procedural rules at odds with prior practice to deny relief to alleged contemnors is a violation of due process). See also *United States v. Lanier*, 520 U.S. 259, 266 (1997) (due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope); *Marks v. United States*, 430 U.S. 188, 191-192(1977)(due process protects against judicial infringement of the "right to fair warning" that certain conduct will give rise to criminal penalties).

Such is the case here. In sustaining the demurrers of the respondents below, both the Circuit Court and the Supreme Court have adopted an unforeseen and unexpected reading of Virginia Code Section 50-73.98---in fact, *they have repealed its provisions entirely*---- so that the petitioners' good faith allegations of a partnership by estoppel are completely disregarded and the respondents' collective conduct operating under the marketing banner of the partnership B & E is made immune from liability. This unfair and stilted reading of the petitioners' complaint, framed precisely within the language of Virginia Code Section 50-73.98, is

"indefensible by reference to the law which had been expressed prior to the conduct in issue," *Bowie*, 378 U.S. at 354; and it is so far beyond what a "fair reading" of Section 50-73.98 would permit as to constitute a denial of due process. *Id.* at 354-355.

While a state may set the terms on which it will permit litigation in its courts, *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 552(1949), it may not close its court house doors to litigants by denying them at the pleading stage the opportunity to be heard on claims which its legislature has already made clear are available to them upon proper proof. The Virginia courts' repudiation of the statutory principle of partnership liability created by estoppel denies the petitioners due process and a fair hearing on their allegations.

### ***C. The Process Due The Petitioners In the Circumstances.***

The petitioners' cause of action is a valuable property right entitled to due process protection. *Los Angeles v. David*, 538 U.S. 715, 717(2003) (deprivation of money is the deprivation of property for purpose of evaluating due process protection). *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538;541 (1985).

This Court's decision in *Mathews v. Eldridge*, 424 U.S. 319, 334-335(1976) dictates that the process due in any given instance is determined by weighing "the private interest that will be affected by the official action" against the government's asserted interest, "including the function involved" and the burdens the government would face in providing greater safeguards. *Id.* at 335. The *Mathews* calculus then contemplates a judicious balancing of these concerns, through an analysis of "the risk of an erroneous deprivation" of the private interest if

the process were reduced and the "probable value, if any, of additional or substitute procedural safeguards." *Id.* See *Hamdi v. Rumsfeld*, 542 U.S. 507, 528-529(2004). See also *Wilkinson v. Austin*, \_\_\_ U.S. \_\_\_, \_\_\_(6/13/05).

Employing the *Mathews* calculus to the circumstances of this case, the petitioners submit that the process due them below consists of the opportunity to conduct further discovery on their allegations of partnership by estoppel, a full trial on the merits of their claims against all of the respondents on this theory of liability based upon partnership by estoppel where their proof will be tested before an impartial tribunal/fact finder. See *Hamdi v. Rumsfeld*, 542 U.S. at 533 quoting *Ward v. Monroeville*, 409 U.S. 57, 61-62(1972); *Goldberg v. Kelly*, 397 U.S. 254, 269-270(1970).

### **Conclusion.**

For all of these reasons identified herein, a writ of certiorari should issue to the Supreme Court of Virginia, to review its decision and vacate the judgment entered in that court and remand the matter to the Circuit Court of Fairfax County for continued discovery and an eventual trial consistent with due process on the petitioners' claims that the respondents' alleged conduct constitutes a partnership by estoppel and that each of them should be jointly and severally liable to the petitioners as partners of this general partnership known by and marketed to the petitioners and the public as B & E; or to provide the petitioners with such other relief as is fair and just in the circumstances.

Respectfully submitted,

Stephen V. Craig, *Pro se*

29

Un Sun H. Craig, *Pro se*  
7545 Laurel  
Creek Lane  
Springfield,  
VA 22150-4908  
(703)866-4543

1a

Virginia:

Record No. 050605  
Circuit Court No. L220180

In the Supreme Court of Virginia held at the Supreme  
Court Building in the City of Richmond on Tuesday the  
28<sup>th</sup> day of June, 2005.

Stephen V. Craig, et al.,  
Appellants

Against

Basheer & Edgemoore, et al.,  
Appellees

Form the Circuit Court of Fairfax

Received 6/29/2005

Upon review of the record in this case and  
consideration of the argument submitted in support of  
and in opposition to the granting of an appeal, the  
Court is of opinion there is no reversible error in the  
judgment complained of. Accordingly, the Court  
refuses the petition for appeal.



2a

Virginia

Law No. 220180

IN THE CIRCUIT COURT OF THE FAIRFAX  
COUNTY

STEPHEN V. CRAIG, ET AL.,  
PLAINTIFFS,

V.

DIANE COX BASHEER COMMUNITIES, INC. ET  
AL.,  
DEFENDANTS.

ORDER

THIS CAUSE came before the Court on the Plaintiff's Motion to Dismiss Count One (Breach of Express Warranty) against Defendant Basheer Edgemoore Southampton, L.L.C.

NOW, THEREFORE, it is hereby ADJUDGED, ORDERED and DECREED that the Motion to dismiss is granted and Count One is dismissed with prejudice against Defendant Basheer Edgemoore Southampton, L.L.C.

There being no further Counts or Defendants now before the Court, this order is FINAL.

Entered this 28<sup>th</sup> day of December, 2004

s/ Judge, Circuit Court of Fairfax County

3a

Case No. Law 220180

VIRGINIA:  
IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Stephen V. Craig et al., Plaintiff/Complainant

VS.

Diane Cox Basheer Communities, Inc. et al., Defendant

ORDER

This cause came to be heard on the 9th day of December, 2004, on the Plaintiffs/Defendant's motion to dismiss, demurrer and plea in bar.

Upon the matters presented to the Court at the hearing, it is ORDERED as follows: for the reasons stated from the bench, the motion to dismiss is denied. The demurrer on Count I is sustained as to all defendants except Basheer/Edgemoore-Southampton, LLC, and the demurrers to Count II, III, IV, V and VI are sustained. All demurrers are sustained with prejudice, and the request for leave to amend is denied. The case will proceed forward on Count I breach of warranty, against Basheer/Edgemoore-Southampton, LLC. The plea in bar is rendered moot. The Answer and Grounds of Defense shall be filed within 14 days.

Entered this 9th day of December, 2004.

[Marcus D. Williams]  
Circuit Court Judge

VIRGINIA:

IN THE CIRCUIT COURT OF THE FAIRFAX  
COUNTY

Law No.220180

STEPHEN V. CRAIG and UN SUN H. CRAIG,  
Plaintiffs,

v.

DIANE COX BASHEER COMMUNITIES, INC.,  
t/a DIANE COX BASHEER COMMUNITIES,

serve:

William L. Matson, Registered Agent MATSON,  
FREYVOGEL, P.C. 1650 Tysons Boulevard, Suite 700  
McLean, VA 22102

and

EDGEMOORE HOMES, L.L.C., t/a EDGEMOORE  
HOMES,

serve: John W. Foust, Registered Agent FOUST &  
CLARK, PC 8345-A Greensboro Drive McLean, VA  
22102

and

BASHEER, EDGEMOORE - SOUTHAMPTON,  
L.L.C., t/a BASHEER & EDGEMOORE,

serve: William T. Freyvogel, Esq., Reg. Agent  
MATSON, FREYVOGEL, P.C.

1650 Tysons Boulevard, Suite 700 McLean, VA 22102

BASHEER, EDGEMOORE - WESTHAMPTON,  
L.L.C.,  
t/a BASHEER & EDGEMOORE,  
serve:

William L. Matson, Registered Agent  
MATSON, FREYVOGEL, P.C.  
1650 Tysons Boulevard, Suite 700  
McLean, VA 22102

BASHEER & EDGEMOORE, a Virginia general  
partnership

serve: William L. Matson, Registered Agent for  
partner

DIANE COX BASHEER COMMUNITIES, INC.  
MATSON, FREYVOGEL, P.C.

1650 Tysons Boulevard, Suite 700 McLean, VA 22102  
Defendants, as their interests may appear.

#### FIRST AMENDED MOTION FOR JUDGMENT

COME NOW the Plaintiffs, Stephen V. Craig and Un  
Sun H. Craig, by counsel, and file  
this Motion for Judgment, and in support thereof  
respectfully represent unto the Court as follows:

1. Basheer & Edgemore is a Virginia general  
partnership.
2. The partners of the Basheer & Edgemore  
partnership are Diane Cox Basheer Communities, Inc.,  
Edgemore Homes, L.L.C., Basheer/Edgemore -  
Southampton, L.L.C., Basheer/Edgemore -

Westhampton, L.L.C., and possibly other entities or persons.

3. Edgemoore Homes is the fictitious trade name for Edgemoore Homes, L.L.C., a Virginia Limited Liability Company.

4. Diane Cox Basheer Communities is the fictitious trade name for Diane Cox Basheer Communities, Inc., a Virginia Corporation.

5. Basheer/Edgemoore - Southampton, L.L.C., is a Virginia Limited Liability Company and operates under the trade name Basheer & Edgemoore.

6. Basheer/Edgemoore - Westhampton, L.L.C., is a Virginia Limited Liability Company and operates under the trade name Basheer & Edgemoore.

7. In advertising, marketing, construction, sharing of employees, sharing of contractor licenses, and prolific use of the trade name Basheer & Edgemoore, Diane Cox Basheer Communities, Inc., Edgemoore Homes, L.L.C., Basheer/Edgemoore- Southampton, L.L.C., Basheer/Edgemoore - Westhampton, L.L.C., and possibly other entities or persons have held themselves out to the public as a Virginia general partnership and have operated as a partnership by estoppel.

8. In reliance upon the existence of the general partnership as described in Paragraph 7, Stephen V. Craig and Un Sun H. Craig entered into a contract with the general partnership. Specifically, on or about May 20, 2000, Stephen V. Craig and Un Sun H. Craig entered into an Agreement of Purchase and Sale (the "Agreement") of 7545 Laurel Creek Lane, Springfield, VA 22150 (also referred to as "Lot 36" and the "Property") in Fairfax County, Virginia with Basheer/Edgemoore - Southampton, L.L.C., trading as Basheer & Edgemoore, a member of the general partnership. A



copy of the Agreement is attached hereto as Plaintiffs Exhibit 1.

9. As of May 20, 2000 when the Agreement was executed, Basheer/Edgemoore Southampton, L.L.C. was not a licensed contractor. Basheer/Edgemoore - Southampton, L.L.C. was initially certified (License Number 2705 06874) on February 9, 2001, well into the construction of the Property.

10. Prior to the licensing of Basheer/Edgemoore - Southampton, L.L.C., Basheer & Edgemoore relied upon the contractor's license for Basheer/Edgemoore - Westhampton, L.L.C. to obtain building permits and commence work on the Property under the Agreement.

11. In advertising material for the Property which was provided to the Plaintiffs and to the general public, Basheer & Edgemoore held itself out to be a partnership of Defendants Diane Cox Basheer Communities, Inc. and Edgemoore Homes, L.L.C. See Exhibit 2.

12. In a letter to the Plaintiffs dated May 24, 2000, which transmitted a copy of the Contract to purchase the Property; a letter to the Plaintiffs dated April 13, 2001, which set the closing date for the purchase of the Property; and a letter to the Plaintiffs dated May 3, 2001 which transmitted a copy of the Warranty for the Property, Defendants Diane Cox Basheer Communities, Inc. and Edgemoore Homes, L.L.C. held themselves out to be a partnership trading under the name Basheer & Edgemoore. See Exhibit 3.

13. Defendants Diane -Cox Basheer Communities, Inc., Edgemoore Homes, L.L.C., Westhampton, L.L.C., and Southampton, L.L.C., share employees and officers with one another while operating under the name Basheer & Edgemoore.

14. After a series of addenda to the Agreement referred to in paragraph 8 above, Basheer/Edgemoore - Southampton, L.L.C., a member of the general partnership, sold the Property to the Plaintiffs for a total price of \$610,833.00 and a deed was recorded on May 8, 2001.

15. Basheer & Edgemoore expressly warranted the property with a One Year Limited Warranty (the "Warranty"). See Exhibit 4.

16. Prior to entering into the Agreement, the Plaintiffs had numerous conversations with Ms. Mange Heinly, a Sales Manager for Basheer & Edgemoore.

17. In May, 2000, before contracting to purchase the property, Plaintiff Un Sun Craig emphasized to Ms. Heinly the things that were most important to her in making her decision to purchase.

18. The first item was the price of the Property. The Plaintiffs told Ms. Heinly that they were considering purchasing a used (less than one year old) Basheer & Edgemoore Ashmont model in Westhampton for \$495,000 (the "Alternative"). The Plaintiffs wanted to know the price of the Property to compare to the Alternative. Ms. Heinly told Un Sun Craig the cost of the Property but did not tell her that there would be additional costs associated with upgrades. Ms. Heinly told Un Sun Craig to see a model house in Farcroft in Old Town Fairfax ("Model"). In large part, the Plaintiffs based their decision to forego the purchase of the Alternative and purchase the Property on the quality of the product they saw in the Model and the price quoted to them by Mrs. Heinly.

19. The second item related to the characteristics of the lot for the Property. Un Sun Craig told Ms. Heinly that the front, back, and side yards of the home she was to purchase must be big and flat. In May, 2000 Ms. Heinly

and Un Sun Craig looked at the Alternative together. Ms. Heinly said that the Alternative did not have any privacy and that lot 36 was bigger than the Alternative and flat like the Alternative.

20. Ms. Heinly told the Plaintiffs that they should purchase Lot 36. She assured the Plaintiffs that there would be no slope when construction was completed. When Plaintiffs expressed their concerns about having a big slope during early construction, Ms. Heinly assured the Plaintiffs that once construction was complete there would not be a significant slope. Ms. Heinly also assured Plaintiffs that there would be additional trees planted. The Plaintiffs paid a premium for both the flat lot and the trees. In fact, when construction was completed, the Property had very significant slopes, and the type of trees that were promised were not planted.

21. The Plaintiffs informed Ms. Heinly that they wished to purchase an Ashmont model home with a Southern Style. Ms. Heinly would not accommodate such request, saying in May of 2000 that it was prohibited to put two of the same models next to each other, and that there would be an Ashmont model on the lot next to the lot the Plaintiffs were going to purchase. Despite this, Basheer & Edgemoore later built a home of the same model next to the Plaintiffs' home. There are also three houses of the same model next to each other built by Basheer & Edgemoore elsewhere in the neighborhood. Ms. Heinly misrepresented that such prohibition existed.

22. The Plaintiffs informed Ms. Heinly that they wished to purchase a house with a side sunroom and side garage. Ms. Heinly informed Plaintiffs that Lot 10 would accommodate such a request but that there was a big competition to purchase Lot 10 because many

people were waiting for that Lot. Therefore, the Plaintiffs asked Ms. Heinly if they could build on Lot 8 or Lot 9 without a side garage. Ms. Heinly told them that a side sunroom could not be built on Lot 8 or Lot 9. The homes on Lots 8 and 9 were later built with side sunrooms. Ms. Heinly continued to steer the Plaintiffs to Lot 36 by making misrepresentations to them.

23. Prior to Closing, the Plaintiffs requested to be released from the Agreement and told Ms. Heinly those items which they felt had been misrepresented. The Plaintiffs told Ms. Heinly in July of 2000 that they would rather lose some money deposited pursuant to the Agreement than go forward with a home purchase with which they would not be happy. Ms. Heinly told them that "no one backs out" and refused to discuss terminating the Agreement and forfeiture of the deposit. The Plaintiffs subsequently learned that one or two other purchasers were given the option to build their houses in other lots under similar circumstances.

24. Basheer & Edgemoore, through Ms. Heinly and other representatives of the Defendants, promised the Plaintiffs that their home would be built with the same characteristics and with materials of the same standard, quality, grade, style and model as the Model and as shown in the samples provided by Basheer & Edgemoore, which samples the Plaintiffs saw and upon which they based their decision to purchase the Property. The elements of the Property sold to the Plaintiffs are of grossly inferior quality to those of the Model and that shown in the samples, despite the Plaintiffs' paying \$130,933.00 in premiums and upgrades, some of which had been represented as standard and for which they did not expect to pay extra.

25. Ms. Heinly did not tell the Plaintiffs that a "Bonus" room could not be built on Lot 36 until they had secured Lot 36 and foregone the purchase of the Alternative. There was a "Bonus" room in the Model.

26. Ms. Heinly told the Plaintiffs that no pine trees would be planted adjacent to their Property, but pine trees were planted adjacent to the Property.

27. In June of 2000, Don Smith, a representative of Basheer & Edgemoore, told the Plaintiffs that the common area behind Lot 36 would be landscaped by planting nice shrubs and bushes, instead of grass, but this landscaping was never done.

28. In reliance on the representations of Ms. Heinly and other employees of the Defendants, the Plaintiffs decided to, and did, build a new home and paid \$115,833.00 more than they would have if they had purchased the Alternative that they originally wanted.

29. At the time the Agreement was executed, Basheer/Edgemoore - Southampton L.L.C. was not a licensed contractor despite the fact that they held themselves out to the public to be legally cagaged in such business.

30. Basheer & Edgemoore - Southampton L.L.C. relied upon the contractor's license of its partner Basheer & Edgemoore - Westhampton L.L.C. to obtain permits and begin construction on the Property.

31. Basheer & Edgemoore refused to let the Plaintiffs visit the Property prior to Closing, and told them they would be trespassing if they went on the Property. Other neighboring purchasers of Basheer & Edgemoore Homes were allowed pre-drywall walk-throughs, opportunities that were refused to the Plaintiffs.

32. The Property was warranted for a period of one year by Basheer & Edgemoore from the date of Closing



against defects in workmanship, material, and design. (The "Warranty") See Exhibit D.

33. Under the Warranty, the Plaintiffs were promised a pre-Closing inspection, a re-inspection 90 days after Closing, and an end of year walk-through inspection.

34. In March or April of 2001, Dave Doss, building operations manager for Basheer &

Edgemoore, told the Plaintiffs that he would make the right side of the yard at least walkable and that the right side of the backyard would be the flattest part.

35. In May and June of 2001, Don Smith, a representative of Basheer & Edgemoore, told the Plaintiffs that a crew would work on the slope issues in the back yard and would not lay down sod until the Plaintiffs agreed. In fact, the work subsequently done made the slope worse and the sod was put down over the slope, without agreement from the Plaintiffs.

36. Since closing on May 8, 2001, the Plaintiffs have encountered numerous problems with the Property.

37. John Wells, Superintendent of Construction for Basheer & Edgemoore, told the Plaintiffs in June of 2001 that the house was sold two months before it was ready for closing. Basheer & Edgemoore rushed completion of the construction of the Property in an attempt to have the Property completed within one year from the date of the signing of the Agreement.

38. As a result of this rushed construction, there were numerous leaks from the main pipelines, roof, and various other areas when the Plaintiffs moved in to the property. Many upgraded items were either scratched and/or chipped, installed in the wrong place, with either the wrong materials, or materials of quality inferior to which Basheer & Edgemoore represented would be installed.

39. Attached hereto and incorporated by reference herein as Plaintiffs' Exhibit 5 is a copy of the 90 day Walk-Through discrepancy list the Plaintiffs gave to Basheer & Edgemoore at the 90 day walk-through.

40. The Property was not free from workmanship, material and design defects.

41. Basheer & Edgemoore ordered and installed the wrong materials, denied the Plaintiffs certain upgrades, did not show the Plaintiffs samples that were shown to others, charged the Plaintiffs for additional upgrades that others did not pay, did not provide the Plaintiffs with items that others received, and created new damage during the course of some attempted repairs and then refused to fix the new damage.

42. The Plaintiffs on numerous occasions, orally and in writing, informed Basheer & Edgemoore of workmanship, material and design defects with the home, as well as new damage created by repair crews while working on the home. Basheer & Edgemoore has made numerous promises that they would correct and repair such defects, but to date the defects have not been corrected or repaired so that they would pass without objection in the trade.

43. On November 30, 2001, Un Sun Craig sent the attached memorandum to Basheer & Edgemoore detailing items that needed to be corrected and repaired. See Exhibit 6. On December 18, 2001, Richard J. Cone of Basheer & Edgemoore responded to the Plaintiffs' letter of November 30, 2001 stating "80-85% of the items on the list have been completed" when in fact they had not been completed. See Exhibit 7.

44. On March 13, 2002, the Plaintiffs sent the attached Memorandum to Basheer & Edgemoore requesting items to be completed under the Warranty. See Exhibit 8.

45. Pursuant to the terms of the Warranty, the Plaintiffs were entitled to a one-year walk through inspection. At the time set the one-year walk through inspection, John Saul, Warranty Service Manager of Basheer & Edgemore, refused to conduct the inspection unless the Plaintiffs signed a waiver of all rights prior to the inspection. When Plaintiffs did not sign this waiver, John Saul refused to conduct the inspection. See Exhibit 9. It is not the policy of Basheer & Edgemore to require such a waiver and it is not part of the Warranty.

46. The attempt to make the Plaintiffs sign a waiver of their rights under the warranty prior to beginning the final one-year walk through was never required of other home purchasers similarly situated. Basheer & Edgemore refused to conduct the one-year walk through required by the warranty.. Attached hereto and incorporated by reference herein as Plaintiffs' Exhibit 10 is a copy of a punch list prepared by Investment. Protection Corp., a certified home inspector, which report was provided to Basheer & Edgemore, but which Basheer & Edgemore refused to consider.

47. Additionally, the Plaintiffs have recently learned that the distance between the centers of the floor joists as installed by Basheer & Edgemore was greater than that permitted by the architectural drawings submitted to Fairfax Count by the Defendants.

48. This failure to properly construct the Property pursuant to the architectural plans has caused, and continues to cause damage to the Property, including continuous cracking and separating of drywall and tiling throughout the Property.

49. Additionally, the Plaintiffs have recently learned that Basheer & Edgemore failed to install the Radon

mitigation system contracted for by the Plaintiffs in the Agreement.

50. Basheer & Edgemoore employees and supervisors took affirmative steps to conceal from the Plaintiffs the fact that Basheer & Edgemoore had failed to install the Radon mitigation system contracted for by the Plaintiffs.

51. Specifically, on September 26, 2001, John Saul, Warranty Service Manager for Basheer & Edgemoore, noted in his report of his 90 day inspection of the Plaintiffs' Property that the Radon mitigation system had not been installed but that this fact "was not conveyed to owner."

52. Specifically, on October 5, 2001, Robert Broy, Warranty Service Employee for Basheer & Edgemoore, wrote in a memorandum to the file that the Radon mitigation system had not been installed. Neither Mr. Broy nor Basheer & Edgemoore ever informed the Plaintiffs of this failure to install the Radon mitigation system.

53. Radon-levels subsequently measured for the Property grossly exceed the maximum allowable safe levels as established by the federal Environmental Protection Agency. COUNT ONE

#### BREACH OF EXPRESS WARRANTY (All Defendants)

54. Plaintiffs reallege and incorporate by reference herein the allegations contained in numbered paragraphs one (1) through fifty-three (53) above. In reliance upon the existence of the general partnership as described in Paragraph 7, Stephen V. Craig and Un Sun H. Craig entered into a contract with the general partnership. Specifically, on or about May 20, 2000,

Stephen V. Craig and Un Sun H. Craig entered into an Agreement of Purchase and Sale (the "Agreement") of 7545 Laurel Creek Lane, Springfield, VA 22150 (also referred to as "Lot 36" and the "Property") in Fairfax County, Virginia with Basheerl Edgemoore - Southampton, L.L.C., trading as Basheer & Edgemoore, a member of the general partnership. Pursuant to the provisions of the contract, Basheer & Edgemoore provided the Plaintiffs with an express written warranty that the Property would be free from workmanship and material defects. (Exhibit 2).

55. The written warranty provides, "For a period of one year, from the date of your closing, Basheer & Edgemoore warrants your home against workmanship and material defects. Your Superintendent, John Wells, will complete any remaining items on your pre-closing inspection list. Approximately 90 days after closing, you will be contacted by our Customer Service Manager, John Saul, to schedule a re-inspection of your home to ascertain all is going well for you as a new homeowner,... Then again, just prior to the end of your first year of homeownership, John will be in touch with you to arrange an end of year walk-through." (Exhibit B).

56. The Plaintiffs have complied with their obligations under the Warranty and have made known to Basheer & Edgemoore certain workmanship, material and design defects which are more fully set forth in Exhibits 6, 8 and 10.

57. Basheer & Edgemoore has promised to make repairs and alterations to the Property. Such repairs and alterations have either not been done, or have not been done properly, or if done, have created additional damage that has not been repaired.



58. Basheer & Edgemoore has refused to compensate the Plaintiffs for these damages.

59. Basheer & Edgemoore refused to honor their obligation to provide the Plaintiffs with a one-year walk-through, denying the Plaintiffs the benefit of the warranty.

60. As a direct and proximate result of Basheer & Edgemoore's breach of express warranty, the Property is not free from workmanship, material and design defects, it is not free from structural defects, it is not constructed in a workmanlike manner, it is not fit for habitation, the Property is not worth the value it would have if free from defects as warranted, and the Plaintiffs have had to pay money out of pocket to correct and repair those items that the Basheer & Edgemoore has wrongfully refused to correct and repair.

61. In order to put the Property in the condition as contracted for and warranted by Basheer & Edgemoore, the Plaintiffs will be required to expend in excess of \$200,000.

62. As partners in the general partnership Basheer & Edgemoore, Diane Cox Basheer Communities, Inc., Edgemoore Homes, L.L.C., Basheer/Edgemoore - Southampton, L.L.C., Basheer/Edgemoore - Westhampton, L.L.C., are jointly and severally liable for the debts of the partnership.

WHEREFORE, on Count I the Plaintiffs seek an award of damages against Basheer & Edgemoore, Diane Cox Basheer Communities, Inc., Edgemoore Homes, L.L.C., Basheer/Edgemoore - Southampton, L.L.C., and Basheer/Edgemoore-Westhampton, L.L.C., for breach of the Warranty.

**COUNT TWO**  
**BREACH OF THE VIRGINIA CONSUMER**  
**PROTECTION ACT**

(Defendants Basheer/Edgemoore-Southampton L.L.C.-  
and Basheer/Edgemoore General Partnership)

63. Plaintiffs reallege and incorporate by reference herein the allegations contained in numbered paragraphs one (1) through fifty-three (53) above.

64. The sale of the Property is a consumer transaction in Virginia and is regulated and subject to the Virginia Consumer Protection Act. (Virginia Code §59.1-196 et seq. ). The Act prohibits suppliers from misrepresenting that goods or services have certain quantities, characteristics, uses or benefits. The Act also prohibits suppliers from misrepresenting that goods or services are of a particular standard, quality, grade, style or model.

65. In violation of the Act, Basheer & Edgemoore willfully and intentionally misrepresented the characteristics, standards, quality, grade, style and model of the Property that they sold to the Plaintiffs.

66. Basheer & Edgemoore also willfully and intentionally misrepresented the rights that the Plaintiffs would have under the Warranty. The Warranty provided by Basheer & Edgemoore is deceptive in that it promises freedom from workmanship and material defects, yet Basheer & Edgemoore limited the ability of the Plaintiffs to assert their rights under the warranty by refusing to do the work, by requiring the Plaintiffs to waive their rights under the Warranty, refusing to accept a written explanation from the Plaintiff of defects, and refusing to give the Plaintiffs a walk-through as promised. The net

result is that the Warranty is worthless, misleading the Plaintiffs to believe it was of some value to them.

67. Basheer & Edgemoore also willfully and intentionally misrepresented the rights the Plaintiffs had to repudiate the Agreement, the lots that were available on which to build, and the model that could be built on the lot.

68. Basheer & Edgemoore willfully and intentionally misrepresented that all other lots would have a higher premium than the lot purchased by the Plaintiffs, and misrepresented that their lot would be flat with privacy when in fact it is severely sloped with little privacy.

69. Basheer & Edgemoore willfully and intentionally misrepresented that all utility lines in the Southampton entrance would be buried underground when in fact there are aboveground utility poles.

70. Basheer & Edgemoore willfully and intentionally misrepresented that the home sold to the Plaintiffs would be finished without material and design defects, willfully misrepresented the quality of materials to be incorporated in the home, and willfully misrepresented that the home would be delivered free from leaks in the roof, pipelines, and other places.

71. Further, Basheer & Edgermoore willfully and intentionally held themselves out to be licensed to transact business in Virginia when in fact they did not have a contractor's license. 72. Moreover, Basheer & Edgemoore willfully and intentionally sold the home two months before it was finished, even though the Plaintiffs requested a delay so that the home could be completed properly.

73. The Defendants, pursuant to the terms of the Agreement, were required to install a Radon mitigation system. The Defendants willfully and intentionally did not install the Radon mitigation system and willfully

and intentionally concealed the failure to install this system from the Plaintiffs. Specifically, on September 26, 2001, John Saul, Warranty Service Manager for Basheer & Edgemoore, noted in his 90 day inspection report of the Plaintiffs' Property that the Radon mitigation system had not been installed and that this information "was not conveyed to owner." John Saul did not advise the plaintiffs of the absence of the Radon mitigation system because in his view he worked for the builder and was not a home inspector. Specifically, on October 5, 2001, Robert Broy, Warranty Service Employee for Basheer & Edgemoore, wrote a memorandum to the file that the Radon mitigation system had not been installed. Neither Mr. Broy nor Basheer & Edgemoore ever informed the Plaintiffs of this failure to install the Radon mitigation system. The concealment of these facts from the Plaintiffs was done willfully, knowingly and intentionally, and was intended to conceal from the Plaintiffs the failure of the Defendants to perform their obligations under the Agreement.

74. These misrepresentations were made willfully and intentionally to make a sale that Basheer & Edgemoore would not have been able to make to these Plaintiffs without the misrepresentations.

75. The Plaintiffs purchased the Property in reliance on Basheer & Edgemoore's willful and intentional misrepresentations and have suffered monetary damage and great inconvenience. WHEREFORE, on Count II the Plaintiffs seek an award of damages against Defendants Basheer/Edgemoore-Southampton L.L.C. and Basheer/Edgemoore General Partnership, in an amount the greater of \$500.00 or the difference in either the value of the Property as represented by Basheer & Edgemoore or the value of other property

the Plaintiffs sought to purchase and the Property as delivered by Basheer & Edgemoore as well as money spent by the Plaintiffs in an attempt to make repairs or alterations to the Property to bring it to the value of the Property they would have purchased or the Property as represented, and for each willful violation, the greater of \$1,000.00 or three times their actual damages incurred as outlined above together with an award of reasonable attorneys fees and costs incurred as provided in Virginia Code §59.1-204.

### COUNT THREE FRAUDULENT INDUCEMENT

(Defendants Basheer/Edgemoore-Southampton L.L.C. and Basheer/Edgemoore General Partnership)

76. Plaintiffs reallege and incorporate by reference herein the allegations contained in numbered paragraphs one (1) through fifty-three (53) above.

77. Representatives of Basheer & Edgemoore made misrepresentations of material facts to the Plaintiffs that they either knew, or should have known, were false.

78. Misrepresentations were made knowingly to induce to Plaintiffs to enter into a Contract with Basheer & Edgemoore.

79. Misrepresentations were made regarding present facts known to Basheer & Edgemoore such as at the time they promised the Plaintiffs that their yard would be flat, they knew that the yard would not be flat and they had no intention of making it flat despite their assurances to the contrary.

80. Ms. Marge Heinly knew or should have known when she stated that the Property would be as flat as the



Alternative that her representation to the Plaintiffs was false.

81. Ms. Heinly knew when she stated that the Plaintiffs' home would be of the same quality finish and structural integrity as the Model that Basheer & Edgemoore would not build a home of the same quality finish and structural integrity as the model.

82. These misrepresentations were made knowing that promises would not be fulfilled.

83. Basheer & Edgemoore made misrepresentations knowingly and intentionally to mislead the Plaintiffs and as such perpetrated actual fraud on the Plaintiffs.

84. Basheer & Edgemoore misrepresented the characteristics, standards, quality, grade, style and model of the Property that they sold to the Plaintiffs.

85. Basheer & Edgemoore misrepresented the rights that the Plaintiffs would have under the Warranty.

86. Basheer & Edgemoore representatives knowingly and intentionally misrepresented the rights the Plaintiffs had to repudiate the Agreement, the lots that were available on which to build, and the model that could be built on the lot Basheer & Edgemoore forced the Plaintiffs to buy, causing the Plaintiffs to pay for a more expensive model.

87. Basheer & Edgemoore representatives misrepresented the lot they were selling to the Plaintiffs to be flat and have privacy.

88. Basheer & Edgemoore misrepresented that utilities would be underground and there would be no aboveground wires and poles.

89. Basheer & Edgemoore misrepresented that all other lots had a higher premium than the lot purchased by the Plaintiffs, and misrepresented that the lot sold to the Plaintiffs was flat with privacy when in fact it was severely sloped with little privacy.

90. Basheer & Edgemore held themselves out to be licensed to transact business in Virginia when in fact they did not have a contractor's license.

91. The Defendants, pursuant to the terms of the Agreement, were required to install a Radon mitigation system. The Defendants willfully and intentionally did not install the Radon mitigation system and willfully and intentionally concealed the failure to install this system from the Plaintiffs. Specifically, on September 26, 2001, John Saul, Warranty Service Manager for Basheer & Edgemore, noted in his 90 day inspection report of the Plaintiffs' Property that the Radon mitigation system had not been installed and that this information "was not conveyed to owner." John Saul did not advise the plaintiffs of the absence of the Radon mitigation system because in his view he worked for the builder and was not a home inspector. Specifically, on October 5, 2001, Robert Broy, Warranty Service Employee for Basheer & Edgemore, wrote a memorandum to the file that the Radon mitigation system had not been installed. Neither Mr. Broy nor Basheer & Edgemore ever informed the Plaintiffs of this failure to install the Radon mitigation system. The concealment of these facts from the Plaintiffs was done willfully, knowingly and intentionally, and was intended to conceal from the Plaintiffs the failure of the Defendants to perform their obligations under the Agreement.

92. These misrepresentations were made to make a sale that Basheer & Edgemore would not have been able to make to these Plaintiffs without the misrepresentations.

93. The Plaintiffs purchased the Property in justifiable reliance on Basheer & Edgemore's misrepresentations

and have suffered monetary damage and great inconvenience.

94. Basheer & Edgemoore acted with actual malice toward the Plaintiffs and Basheer & Edgemoore acted under circumstances amounting to a willful and wanton disregard of the Plaintiffs' rights.

95. In order to put the Property in the condition as contracted for by the Plaintiffs and to correct the defects, it will cost in excess of \$350,000.00.

WHEREFORE, on Count III the Plaintiffs seek an award of compensatory damages against Defendants Basheer/Edgemoore-Southampton L.L.C. and Basheer/Edgemoore General Partnership for an amount to be proven at trial as well as money spent by the Plaintiffs in an attempt to make such repairs or alterations themselves as well as punitive damages in the amount of THREE HUNDRED FIFTY THOUSAND DOLLARS (\$350,000.00) and for such other and further relief as may seem appropriate to the Court under the circumstances of this case.

COUNT FOUR  
ACTUAL FRAUD  
(All Defendants)

96. Plaintiffs reallege and incorporate by reference herein the allegations contained in numbered paragraphs one (1) through fifty-three (53) above.

97. The Defendants, pursuant to the terms of the Agreement, were required to install a Radon mitigation system. The Defendants knew they were required to install a Radon mitigation system pursuant to the terms of the Agreement and intentionally and willfully failed to install the Radon mitigation system and intentionally and willfully concealed this fact from the

Plaintiffs. Specifically, on September 26, 2001, John Saul, Warranty Service Manager for Basheer & Edgemoore, noted in his 90 day inspection report of the Plaintiffs' Property that the Radon mitigation system had not been installed and that this information "was not conveyed to owner." John Saul did not advise the plaintiffs of the absence of the Radon mitigation system because he stated he worked for the builder and was not a home inspector. Specifically, on October 5, 2001, Robert Broy, Warranty Service Employee for Basheer & Edgemoore, wrote a memorandum to the file that the Radon mitigation system had not been installed. Neither Mr. Broy nor Basheer & Edgemoore ever informed the Plaintiffs of this failure to install the Radon mitigation system.

98. The concealment of these facts from the Plaintiffs was done willfully, knowingly and intentionally, and was intended to conceal from the Plaintiffs the failure of the Defendants to perform their obligations under the Agreement.

99. These actions constitute actual fraud by the Defendants.

100. As a result of a series of tests, the Plaintiffs have determined that the Radon levels in their home grossly exceed the standards established by the federal Environmental Protection Agency.

101. As a result of the Defendants' intentional concealment of the fact that the Radon mitigation system had not been installed, the Plaintiffs have lived in a house with unsafe levels of Radon.

102. As a further result of Defendants' actions, the Plaintiffs have been deprived of the use and enjoyment of a substantial portion of their house for an extended period of time.

103. As a further result of Defendants' actions Plaintiffs suffered severe mental and emotional distress.

104. As a further result of Defendants' actions, Plaintiff Un Sun Craig suffered injury and pain to her right arm and shoulder because of the necessity of moving heavy objects in order to effectuate repairs of cement cracks required to be repaired in order to install the Radon mitigation system.

105. As a further result of Defendants' actions, Plaintiffs suffered monetary losses for necessary testing and installation of a Radon mitigation system.

WHEREFORE, the Plaintiffs seek an award of compensatory damages in the amount of FIVE HUNDRED THOUSAND DOLLARS (\$500,000.00), an award of punitive damages in the amount of THREE HUNDRED FIFTY THOUSAND DOLLARS (\$350,000.00), an award of their costs, expenses and attorneys fees, and such other and further relief as may seem appropriate to the Court under the circumstances of this case.

COUNT FIVE  
CONSTRUCTIVE FRAUD  
(All Defendants)

106. Plaintiffs reallege and incorporate by reference herein the allegations contained in numbered paragraphs one (1) through fifty-three (53) above.

107. The Defendants, pursuant to the terms of the Agreement, were required to install a Radon mitigation system. The Defendants knew they were required to install a Radon mitigation system pursuant to the terms of the Agreement and intentionally and willfully

failed to install the Radon mitigation system and intentionally and willfully concealed this fact from the Plaintiffs. Specifically, on September 26, 2001, John Saul, Warranty Service Manager for Basheer & Edgemoore, noted in his 90 day inspection report of the Plaintiffs' Property that the Radon mitigation system had not been installed and that this information "was not conveyed to owner." John Saul did not advise the plaintiffs of the absence of the Radon mitigation system because he stated he worked for the builder and was not a home inspector. Specifically, on October 5, 2001, Robert Broy, Warranty Service Employee for Basheer & Edgemoore, wrote a memorandum to the file that the Radon mitigation system had not been installed. Neither Mr. Broy nor Basheer & Edgemoore ever informed the Plaintiffs of this failure to install the Radon mitigation system.

108. The concealment of these facts from the Plaintiffs was done willfully, knowingly and intentionally, and was intended to conceal from the Plaintiffs the failure of the Defendants to perform their obligations under the Agreement.

109. These actions constitute constructive fraud by the Defendants.

110. As a result of a series of tests, the Plaintiffs have determined that the Radon levels in their home grossly exceed the standards established by the federal Environmental Protection Agency.

111. As a result of the Defendants' intentional concealment of the fact that the Radon mitigation system had not been installed, the Plaintiffs have lived in a house with unsafe levels of Radon.

112. As a further result of Defendants' actions, the Plaintiffs have been deprived of the use and enjoyment



of a substantial portion of their house for an extended period of time.

113. As a further result of Defendants' actions, Plaintiffs suffered severe mental and emotional distress.

114. As a further result of Defendants' actions, Plaintiff Un Sun Craig suffered injury and pain to her right arm and shoulder because of the necessity of moving heavy objects in order to effectuate repairs of cement cracks required to be repaired in order to install the Radon mitigation system.

115. As a further result of Defendants' actions, Plaintiffs suffered monetary losses for necessary testing and installation of a Radon mitigation system.

WHEREFORE, the Plaintiffs seek an award of compensatory damages in the amount of FIVE HUNDRED THOUSAND DOLLARS (\$500,000.00), an award of punitive damages in the amount of THREE HUNDRED FIFTY THOUSAND DOLLARS (\$350,000.00), an award of their costs, expenses and attorneys fees, and such other and further relief as may seem appropriate to the Court under the circumstances of this case.

#### COUNT SIX VICARIOUS LIABILITY (All Defendants)

116. Plaintiffs reallege and incorporate by reference herein the allegations contained in numbered paragraphs one (1) through (53) fifty-three above.

117. The partners of the Basheer & Edgemoore partnership are Diane Cox Basheer Communities, Inc., Edgemoore Homes, L.L.C., Basheer/Edgemoore - Southampton, L.L.C., Basheer/Edgemoore -

Westhampton, L.L.C. and possibly other entities or persons.

118. In advertising, marketing, construction, sharing of employees, sharing of contractor licenses, and prolific use of the trade name Basheer & Edgemoore, Diane Cox Basheer Communities, Inc., Edgemoore Homes, L.L.C., Basheer/Edgemoore-Southampton, L.L.C. and Basheer/Edgemoore-Westhampton, L.L.C. and possibly other entities or persons have held themselves out to the public as a Virginia general partnership and have operated as a partnership by estoppel.

119. Prior to the licensing of Basheer/Edgemoore Southampton, L.L.C., Basheer & Edgemoore relied upon the contractor's license for Basheer/Edgemoore - Westhampton, L.L.C. to obtain building permits and commence work on the Property under the Agreement.

120. In advertising material for the Property which was provided to the Plaintiffs and to the general public Basheer & Edgemoore held itself out to be a partnership of Defendants Diane Cox Basheer Communities, Inc. and Edgemoore Homes, L.L.C. See Exhibit B.

121. In a letter to the Plaintiffs dated May 24, 2000, which transmitted a copy of the contract to purchase the Property; a letter dated April 13, 2001, which set the closing date for the purchase of the Property; and a letter dated May 3, 2001 which transmitted a copy of the Warranty for the Property, Defendants Diane Cox Basheer Communities, Inc. and Edgemoore Homes, L.L.C. held themselves out to be a partnership trading under the name Basheer & Edgemoore. See Exhibit 3.

122. Defendants Diane Cox Basheer Communities, Inc., Edgemoore Homes, L.L.C., Westhampton, L.L.C., Southampton, L.L.C., and share employees and officers

with one another while operating under the name Basheer & Edgemoore.

123. In reliance upon the existence of the general partnership as described above, Stephen V. Craig and Un Sun H. Craig entered into a contract with the general partnership. Specifically, on or about May 20, 2000, Stephen V. Craig and Un Sun H. Craig entered into an Agreement of Purchase and Sale (the "Agreement") of 7545 Laurel Creek Lane, Springfield, VA 22150 (also referred to as "Lot 36" and the "Property") in Fairfax County, Virginia with Basheer/Edgemoore - Southampton, L.L.C., trading as Basheer & Edgemoore, a member of the general partnership.

124. As alleged in Count I, Basheer & Edgemoore breached its warranty to the Plaintiffs.

125. As alleged in Count II, Basheer & Edgemoore violated the Virginia Consumer Protection Act.

126. As alleged in Count III, Basheer & Edgemoore fraudulently induced the Plaintiffs to enter into the Agreement.

127. As alleged in Count IV, Basheer & Edgemoore committed actual fraud.

128. As alleged in Count V, Basheer & Edgemoore committed constructive fraud.

129. All of the acts alleged herein were conducted by partners of the Basheer & Edgemoore general partnership in furtherance of the Basheer & Edgemoore partnership business.

130. As partners-in the Basheer & Edgemoore general partnership, Diane Cox Basheer Communities, Inc., Edgemoore Homes, L.L.C., Basheer/Edgemoore - Southampton, L.L.C., and Basheer/Edgemoore-Westhampton, L.L.C., are jointly and severally liable for the debts of the partnership and liable for the torts conducted in furtherance of the partnership.

WHEREFORE, the Plaintiffs seek a finding of joint and several liability against Diane Cox Basheer Communities, Inc., Edgemoore Homes, L.L.C., Basheer/Edgemoore - Southampton, L.L.C., and Basheer/Edgemoore - Westhampton, L.L.C. in the amount of FIVE HUNDRED THOUSAND DOLLARS (\$500,000.00), an award of punitive damages in the amount of THREE HUNDRED FIFTY THOUSAND DOLLARS (\$350,000.00), an award of their costs, expenses, and attorneys fees, and such other and further relief as may seem appropriate to the Court under the circumstances of this case.

Respectfully submitted,

Danle F. Rinzel VS #471  
E. Andrew Burcher., VSB#41310  
REDMON, PEYTON & BRASWELL, LLP  
510 King Street, Suite 301  
Alexandria, VA 22314  
Counsel for Plaintiffs

BOCA-Certified Code Inspector (Bldg., Mech., Elec., Plumb.); CABO-Certified Building Official; Member, American Society of Home Inspectors; New Residential Construction Expert 28 Years of Experience

Neil Swanson Home Inspections

Neil E. Swanson

7180 Baldwin Ridge Road Warrenton, VA 20187 540-349-7862

December 10, 2004

Col. and Mrs. Stephen Craig 7545 Laurel Creek Lane  
Springfield, VA 22150

Dear Col. and Mrs. Craig:

I am pleased to submit this report of my inspections on May 15, 2003, June 17, 2003, and December 6, 2004 of the house at 7545 Laurel Creek Lane, Springfield, VA 22150. The December 6 installment of this inspection was a relatively brief reinspection at which time it was observed that almost all of the defects noted on the previous two visits remained uncorrected. Most of the few exceptions are at defects previously found in the sump crock area. where corrections had reportedly been made at the homeowner's expense in order to deal with the radon hazard. One other corrected condition noted was at the area of the main water shutoff where a leak was no longer observed; this also was reportedly corrected by the homeowner's plumber. The only defects added to the list on December 6 were defects #1.10,13.15,17.12, and 17.13.

Because of the time required to inspect many important components on this house, there may not have been time to address in this report some of your expressed concerns or other obvious defects. This does not mean that these are unimportant. Therefore, along with this report, you should submit to your builder in a timely manner a list of any other concerns.

### DISCLAIMER

This report is based only on those visible conditions observed on the dates of inspection. No representation is made regarding latent or concealed defects, and no warranty is expressed or implied. This report is made only in the best exercise of my ability and judgment.

Even though my analysis of some conditions on this house may turn out to be more accurate than that of some so-called "specialists" in the disciplines involved, I am not a specialist in these disciplines and do not necessarily have available all of the knowledge and other tools of analysis available to a qualified specialist. This report is offered only as the opinion of a general practitioner in the broad, multi-disciplinary field of new home construction.

Please call me if you have any questions.

Sincerely,  
Neil E. Swanson Building Consultant



Section III: Summary of Code-Related Defects Only  
7545 Laurel Creek Lane  
Springfield, VA 22150 May 15, June 17, 2003 and  
December 6, 2004

Each defect listed below was found in at least one location on this house. Similar mistakes are likely to have occurred in other locations. Therefore, the builder should check all similar components for similar defects. Any example given should be treated as one example and not as the only instance.

1. Structure: A state-licensed professional structural engineer familiar with residential construction should be consulted regarding an defects listed in this "structure" section.

1.1. C'-No foundation returning around front right corner of garage under sill plate and jack studs; treated jack studs instead appear to have been extended all the way down to slab but appear to not have been secured and are therefore vulnerable to shifting too easily if attached trim board is clipped by a car in a manner that would generally only damage trim and not move structural components.

1.2. C'-Out-of-plumb floor joists over bearing area, e.g., left end of dining room joist 19" in from rear; other examples were seen at beam ends of most of sun room joists which almost all lean slightly toward rear; other examples are seen at dining room ends of some kitchen floor joists; check other areas.

1.3. C'-One or more holes through joist webbing too large given closeness of holes to joist bearing (see manufacturer's specs), e.g., on dining room joist 19" in from rear where 8" square hole has been put through webbing about 4' from bearing point.

1.4. C'-Basement stairs landing joists need joist hangers at front ends; one or more of these joists are toenailed from only one side. Rear ends of some of these joists also not soundly supported.

1.5. C'-One or more steel columns in basement extending through slab where an opening had to be cut out through slab indicating that any original footing in this area was probably not centered under point where column has been placed, e.g., column near door to unfinished area of basement; opening does not appear to have been cut out far enough to easily dig proper footing under this area; homeowner should at least be provided with certification that proper footing corrections were made here and inspected by county.

1.6. C'-Joist hangers supporting header joist near furnace/water heater vent (chimney) not adequate for providing support here on these manufactured joists, since these joist hangers have been altered by cutting off top ends (at at least one side of each hanger) that needed to lap over joists at each end of header.

Also, joist hanger supporting cut-off joist has been rebent at top, leaving it hanging down so that it does not reliably support this joist at proper level.

1.7. C'-Roof truss lateral bracing not installed where likely required by truss manufacturer such as on 5' or longer members transferring top chord load to bearing walls (check truss drawings), e.g., across front end of at least half of main trusses and across rear ends of at least four trusses (where some bracing is obviously on wrong members, since on undersides of top chords); check elsewhere.

1.8. C'-Broken roof trusses repaired in inadequate manner, e.g.,

- a) approximately 6' down from ridge on truss 2' to right (plan view) from attic access opening; here top chord is broken apart;
- b) approximately 10' down from ridge on same truss where gusset plates are completely disconnected at top end of a vertical member which has been left extending up beside top chord with three nails reattaching it all in same grain of top chord and all within 1/2" of top of vertical member;
- c) at truss 4' to right of attic access opening where there are additional example of inadequately repaired, disconnected gusset plates and a split top chord;
- d) at truss 6' to right of attic access opening where separated gusset plate have also not been adequately repaired.

Check others.

1.9. C'-Inadequate support of narrow roof sheathing strips at ridge.

1.10. C'-Framing of house (especially floors) not in conformance with approved plans. (2. Basement

2.3. C'-Hole through basement slab not adequately sealed, e.g., down between two crowded-together sump crocks; check others.

### 3. Electrical System

3.1. C'-25-amp breaker in panel exceeds 20-amp maximum on sun room AC rating plate.

3.2. C'-Circuit identification in panel inadequate, e.g., which system served by which AC breaker since no numbers are provided on AC condenser units to correspond to numbers indicated in panel; also, numbers on AC breakers in panel are not consistent with numbers indicated on some heating system breakers. (Consistent numbering needs to be provided for: all heating/cooling interior equipment; all

heating/cooling exterior equipment; all exterior AC disconnects.)

3.3. C'-Some recessed light fixtures not remaining properly positioned against ceiling, e.g., recessed fixtures in master bath; check all recessed fixtures.

3.5. C'-Large junction box in kitchen island cabinet includes no screws in cover, leaving potential shock hazard since cover slides right off this box.

#### 4. Plumbing System\_\_

4.1. C'-Water meter cock jammed tightly against critical main shutoff valve.

4.2. C'-Shutoff valve at water meter cock partly closed; part of problem may be conflict of valve with side of meter cock, as noted in previous item.

4.3. C'-Hose bibb not secure in wall, e.g., front hose bibb which pulls right out and rotates in brick; check others.

4.4. C'-Water standing in exterior portion of areaway drain line due to apparent reversed slope or obstruction or intentional trap below drain; such a condition can cause ice or sediment to further obstruct flow in pipe.

4.5. C'-Sump pump discharge pipe unattractively extending out over foundation wall instead of extending down inner side of foundation wall to come out lower through foundation in line with standard good practice; presently pipe unattractively extends down at distance of about 6" off foundation and is not even adequately secured and is likely to occasionally send water outside instead of into buried foundation drain.

4.6. C'-Copper against steel, e.g., at kitchen exhaust duct offsetting around some copper pipes just below range; check other areas.

4.7. C'-Continuous, slow leak at connection of plastic water service entrance line to copper interior main water line.

4.8. C'-Sump pump not coming on at all (even when tethered-type float is turned upside down into "on" position) in sump crock serving foundation drains.

4.9. C'-Check valve on above sump pump discharge line installed upside down; flat side of this type of check valve needs to face up when valve is installed in horizontal position as is case here.

4.10. C'-Debris in foundation drain sump crock; same problem seen on sump crock serving areaway drain.

4.13. C'-Check valve on areaway drain sump pump discharge line not adequately tightened at any of four hose clamps on this rubber check valve; valve blew apart when pump was brought on; check valve was reconnected and tightened at all four clamps during this inspection, but should be rechecked.

4.15. C'-Areaway drain sticking up slightly above surface of areaway landing, thus increasing chance of silt, water, and ice puddling here.

4.19. C'-Toilet in buddy bath obviously relocated from crooked earlier position, but left with a) caulk residue on tiles outlining earlier position of toilet;

b) no caulk reinstalled around base of toilet; c) cracked tiles at back side of toilet.

#### 5. Heating and Cooling Systems Lower system

5.1.3. C'-Likely oversized outside air intake (7" duct and 7" wall cap) wasting energy; check calculation for sizing outside air intake. (This size may be needed due to large number of gas appliances in this house, but certainly the second one is not needed as is addressed further on sun room system.)

5.1.4. C'-No flanges at front of filter slot to help retain filter from collapsing and to discourage unfiltered air from sneaking around filter; filter found beginning to collapse in toward furnace at front of filter track due to this lack of flanges. 5.1.5. C'-Filter not high-velocity

type specified by manufacturer; oversized filter slot which has been provided here (allowing use of oversized, low-velocity filter) is not enough to make up for reduced velocity of present disposable filter, since effective filter cross-section is not increased significantly when filter slot is not adequately set back away from smaller original opening and since edge of furnace case has been bent out toward filter, effectively blocking even partial flow through upper portion of filter.

5.1.6. C'-Apparent condensate leak onto furnace, e.g., some rusting on burner area.

5.1.7. C'-Duct air flow restricted by sharp flex duct turn at straight takeoff, e.g., on basement return duct connecting to return grill box; check others.

Upper system

5.2.2. C'-Drain-clogging insulation in overflow pan in attic.

5.2.3. C'-Air leaks at coil case; rubber grommets intended to seal around AC refrigerant lines were found lying on service platform.

5.2.4. C'-Gaps open between burner area and fan compartment; regional service manager for York International (Allan Maroney at 1-800-290-3818 x 221) says that these holes should be closed in some manner such as with "dumdum." 5.2.5. C'-Gaps opening in taped seal of return plenum to furnace case, e.g., at one side of plenum.

5.2.6. C'-Uninsulated, bare metal walls of fan portion of furnace case exposed in attic. Sun room system

5.3.1. C'-Thermostat located where it can be hit by direct sun at some times of year.

5.3.2. C'-Too little room left for wall or duct insulation between heating trunk and foundation wall, e.g., at sun



room furnace and all related nearby supply and return ductwork.

5.3.3. C'-Air leaks at coil case, especially at large, round hole in coil case.

5.3.5. C'-Apparent condensate leak onto furnace, e.g., rust occurring at top and bottom of blower compartment. 5.3.7. C'-Apparent oversized outside air intake (7" duct and 7" wall cap) wasting energy; check calculation for sizing outside air intake. (No intake at all likely needed on this system since 7" outside air intake has been provided on main lower system, and sun room system will not necessarily run frequently enough to provide reliable air intake for other gas appliances in house; present outside air intake on this system is likely to result in drawing almost 113 of this system's return air from outside. One of problems this is likely to cause in addition to inefficiency is that it will in cold weather be sending colder mix of air across heat exchanger than is permitted by furnace manufacturer's specifications.)

General heating problems

5.4.1. C'-Multiple systems run into shared condensate drain; here all three systems are sharing at least last portion of this drain line where it turns down into drain.

5.4.2. C'-Shared condensate drains have been pulled loose from floor and raised at drain, adding additional trapping of water in these lines; shared portion of drain turning down into floor drain also has not been cut through floor drain to reduce high likelihood of obstruction occurring here where 3/4" drain line ends against strainer in floor drain.

5.4.3. C'-Heating and cooling likely to be uneven and inefficient given defects noted above. 6. Appliances and Kitchen

6.1. C'-Kitchen exhaust duct leaking air significantly in basement ceiling in area below range; this duct also has other problems noted in other items.

6.2. C'-Kitchen exhaust duct includes combination of elbows and length that may not meet appliance manufacturer's installation specifications; check instructions which may require upsizing of this duct.

6.3. C'-Granite countertop on kitchen peninsula not adequately secured in place and shifting causing cracks to open between this section of marble top and sink section and between this section of marble top and wall-mounted granite backsplash; part of problem may be unstable support under countertop where cabinets have reportedly been shifted to better align them with floor, etc.; countertop attachment to cabinets at this section of countertop includes unattractive and too soft cedar shims sticking out beyond cabinet and dishwasher.

Crack has also opened between sink section and range section; cracks open in countertop surface, especially near sink, too easily allow liquids from countertop work surface to run down through top.

#### 17. Energy Savings and Ventilation

7.1. C'-Bath exhaust fan wall cap flap not opening sufficiently, e.g., main-level powder room wall cap and basement bath wall cap; check all wall caps.

7.2. C'-Out-of-position or missing bandboard insulation, e.g., below rear of sun room where insulation has been ineffectively placed on second joist in from end; other examples of out-of-place bandboard insulation are above electric panel and around radon vent; check other areas.

7.3. C'-Foundation wall insulation missing behind sun room furnace, supply plenum, return plenum, and return trunk where these components have all been installed too close to foundation but still have some

room behind them into which some insulation should be installed, especially since greater heat loss can occur here because of greater difference between air in some of these components and temperature of foundation wall.

7.4. C'-Daylight visible from in basement around AC refrigerant lines where proper air infiltration seal is needed at subsiding in addition to better rain seal at exterior siding.

7.5. C'-Inadequately insulated attic access panel; present piece of insulation too long to slide down into access opening easily.

7.6. C'-Firestopping inadequate at upper-level ceiling, e.g., at top of wall or dead space where considerable air has been leaking out house into attic as indicated by discoloration of insulation in this area off right rear (plan view) corner of attic furnace platform; an open gap can be seen here when insulation is parted; check other areas.

7.7. C'-Inadequately positioned attic insulation retainers, e.g., in center of left end of attic where bottom of one retainer is unattached and pushed out onto soffit, leaving gaps open at each side of it; another retainer two trusses away is detached at one side and hanging down; check others.

7.8. C'-Inadequate ceiling insulation depth, e.g., at left end of attic where insulation averages only about 10" instead of the 12" required with the type of insulation used here in order to provide an R value of 30; check other areas.

7.9. C'-No access to attic space with 30"-plus headroom, e.g., over MBR rear extension; check others. 8. Fireplaces and Chimneys

9. Floors and Stairs

9.1. C'-Many kitchen floor tile grout joints cracking due to apparent excessive deflection from inadequate stiffness of floor for tile support.

9.2. C'-Noises indicating apparent loose subfloor or loose hardwood, e.g., carpeted family room, hardwood living room and other areas; check other areas.

9.3. C'-Creaking stairs treads, e.g., on main stairs and on basement stairs; check others.

9.4. C'-Incorrect riser top of basement stairs; this condition may have evolved from failure to properly plan for tile floor when stairs were installed.

9.5. C'-Subfloor of lower half of landing in basement stairs loose and rattling when stepped on.

9.11. C'-Excess space in guard rail, e.g., at turn in upper hall guardrail approximately above base of main stairs where space is 4 1/2"; another 4 1/2" space is beside first step above landing in main stairs; other spaces that exceed 4" maximum were noticed at one end of guardrail above family room and at lower winder treads in main stairs; check others.

9.14. C'-Incorrect riser top of main stairs where riser is 8 3/4" instead of 8 1/4" maximum permitted as seen at most of other steps in these stairs.

9.15. C'-Tread depths in main stairs do not meet code since one or more treads (measured from nosing to nosing) are less than 9" deep, such as tread just below landing where 1 1/2" overhang of landing nosing reduces 10" total tread below it to 8 1/2"; this tread also differs more than permitted from some other treads in this same run of stairs.

9.21. C'-Unnecessary trip hazard between laundry and tiled kitchen floor where laundry floor is not raised to match kitchen floor, further indicating that kitchen floor was apparently not properly planned for.

## 10. Walls and Ceilings

10.1. C'-Firestopping at openings in first-floor subfloor inadequate, e.g., around kitchen exhaust duct; check others.

10.4. C'-Drywall loose and rattling when bumped at wall between master bath shower and vanity, indicating some possible missing framing in this wall, or at least inadequate attachment; same rattling present on shower side of wall where firm support of drywall is especially needed to avoid cracking of grout joints in tile. Good practice is to provide a stud every 16" in walls to be tiled.

Problems with proper planning and execution of wall framing in this area is indicated by fact that a medicine cabinet was not installed here where one was supposed to go, due apparently to some conflicts in this wall.

#### 11. Windows and Doors

11.2. C'-Necessary amount of space missing between masonry window sills and bottoms of windows or related trim. Such space (which should be filled only with flexible material such as caulk) needed (even if not explicitly specified by some window manufacturers) to accommodate house framing shrinkage and settling which can exert excessive force on windows bridging between framing and masonry veneer.

Evidence of downward movement of windows in relation to brick veneer can be seen already at upper-level windows where most of caulk has cracked along sides and top.

11.3. C'-One or more window screens not properly positioned and secured, e.g., at upper-level windows above study and at pair of windows high on left end of house; check all windows.

11.8. C'-Threshold loose and rattling when stepped on at one or more doors, e.g., house garage door; check others. 11.9. C'-Air leak at door, e.g., at house/garage

door where sweep is not contacting threshold; check others.

11.12. C'-One or more windows stuck shut, e.g., in front center room where neither window will open; check others. 11.13. C'-Primary egress door intermittently binding severely, apparently in response to moisture; check for leaks and swelling of framing, etc.

## 12. Roof

12.1. C'-Metal roof areas uncounterflushed, e.g., at bases of front gables; check others.

12.2. C'-Single-membrane roof on front porch has been done in substandard manner in numerous respects that do not conform to usual specifications of manufacturers of this type of roof covering:

1) membrane has not been installed over sound, smooth surface. For example, there appear to be lumps under membrane.

2) roof has not been properly sloped to avoid ponding.

3) no reflective coating has been provided to protect this roof from UV damage.

The builder should provide the homeowner with specifications from the roof manufacturer that indicate that this type of roof is warranted for use on detached residential construction.

12.3. C'-Drip edge along front of front porch roof installed over top of roof membrane instead of underneath it as is proper practice and as is seen at each end of this roof.

12.4. C'-Front porch roof unnecessarily sending water right off onto front porch steps which can cause hazardous icing and unattractive moss, especially on shady north side of house; diverter installed across front of roof only extends along railing columns and then angles in to center of roof, leaving an area of roof still draining off at front and leaving odd appearance as



compared with a more consistent diverter all the way across front edge.

12.5. C'-Front porch roof membrane penetrated at numerous spots by dozens of small nails shot down through it as toenails securing columns on porch; wind shaking columns of front porch roof railing can wiggle nails and increase likelihood of leak developing here.

12.6. C'-Metal ridge vent crushed down allowing no significant ventilation along at least 3' of right end of highest ridge; check all ridge vents.

12.7. C'-Apparent leak evidence in ceiling insulation in attic below furnace vent flashing at both furnace vents; from attic one can see up between storm collar and furnace vent on each vent indicating no proper seals.

### 13. Exterior Surfaces

13.2. C'-Rusting fasteners not set and filled or otherwise protected, e.g., in trim above high foyer window and in boards securing front porch railing to brick; check others.

13.4. C'-Missing or inadequate brick weep holes in some areas of masonry veneer, e.g., across entire front of living room and at tops and bottoms of all front windows; check all areas of masonry veneer.

13.5. C'-Inadequate corrosion protection on exposed steel lintels supporting masonry, e.g., at at least one garage overhead door; check all lintels.

13.6. C'-Unattractive, rough lumber build-out behind electric meter base including untreated lumber, uncaulked seams, rusting non-corrosion-resistant screws, etc., even though this is at front of house.

13.8. C'-Caulk needed where missing or cracked, e.g., at front of sun room where many vertical joints at windows and trim are uncaulked, and one narrow space created by problem noted above is not even painted; another example is around family room rear window

where deep gap is covered with thin layer of caulk which is already cracking away; check all exterior caulk.

13.13. C'-Trim and/or finishing incomplete above basement windows, e.g., window below rear of family room where finishing is especially unattractive when seen from interior; check others.

13.15. C' -Vinyl siding improperly installed. . Porches and Garages

14.3. C'-Columns on front porch roof railing supported at front edges on strips of untreated lumber sitting down directly on roof in areas of roof that puddle water, as indicated by moss and sediment that have accumulated here.

14.4. C'-Climbable guard rail on areaway.

14.5. C'-Rusting steel railing, e.g., areaway rail; check others. 14.7. C'-Garage door drops unsafely.

15. Grounds

15.1. C'-Excessive driveway steepness.

15.3. C'-Rear yard soil brought up inappropriately steeply to foundation at rear along morning room and areaway; this creates a) need for window wells that obstruct view and daylight at basement windows; b) unnecessary degree of slope in only potentially usable area of rear yard; c) false justification for extra-tall and unattractive areaway wall;

d) unsafe condition at areaway retaining wall where even total of concrete wall and metal railing is less than required 36" guardrail height required for railing alone.

15.4. C'-At least one area of yard steeper than 3:1 maximum slope considered safe for mowing and avoiding erosion, e.g., off right end of house where slope is approximately 2 1/2 to 1; lowering of soil at house or addition of retaining wall likely to be needed here.

## 16. Gutters and Drainage

16.1. C'-Inadequate drainage slope over backfill near foundation, e.g., around sewer cleanout near front hose bibb where there is actually reversed slope; also along left end of house, especially under fireplace bay; check other areas.

## 17. Miscellaneous

17.4. C'-Rusty pipes at gas meter due to inadequate painting.

17.5. C'-Gap below shingle edge open into attic where roof sheathing and top of fascia board do not meet properly, e.g., toward rear from attic access opening where there is also fair-sized hornets' nest, apparently as result of this or other unscreened gaps open into attic; check other areas.

5/15,6/17103,12/6104-Inspection on 7545 Laurel Creek Lane, Springfield, VA 22150 Neil Swanson Home Inspections - (540) 349-7862

**United States Constitution, Amendment XIV,  
Section 1:**

...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law....

**Virginia Code Section 50-73.88(A):**

Except as otherwise provided in subsection B, the association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership.

**Virginia Code Section 50-73.97(A), (B), (D)(2) & (E):**

(A) A partnership may sue or be sued in the name of the partnership;

(B) An action may be brought against the partnership and, except as provided in Section 50-73.96, against any or all partners in the same action or in separate actions.

....

(D) A judgment creditor of a partner may not levy execution against the assets of the partner to satisfy a judgment based on a claim against the partnership unless:

...(2) Liability is imposed on the partner by law or contract independent of the existence of the partnership.

(E) this section applies to any partnership liability or obligation resulting from a representation by a partner or purported partner under Section 50-73.98.

**Virginia Code Section 50-73.98. Liability of a purported partner:**

(A) If a person, by words or conduct, purports to be a partner, or consents to being represented by another as a partner, in a partnership or with one or more persons not partners, the purported partner is liable to a person to whom the representation is made, if that person, relying on the representation, enters into a transaction with the actual or purported partnership. If the representation, either by the purported partner or by a person with the purported partner's consent, is made in a public manner, the purported partner is liable to a person who relies upon the purported partnership even if the purported partner is not aware of being held out as a partner to the claimant. If partnership liability results, the purported partner is liable with respect to that liability as if the purported partner were a partner. If no partnership liability results, the purported partner is liable with respect to that liability jointly and severally with any other person consenting to the representation.

(B) If a person is thus represented to be a partner in an existing partnership, or with one or more persons not partners, the purported partner is an agent of persons consenting to the representation to bind them to the same extent and in the same manner as if the purported partner were a partner, with respect to persons who enter into transactions in reliance upon the representation. If all of the partners of the existing partnership consent to the representation, a partnership act or obligation results. If fewer than all of the partners of the existing partnership consent to the representation, the person acting and the partners

consenting to the representation are jointly and severally liable.

(C) A person is not liable as a partner merely because the person is named by another in a statement of partnership authority.

(D) A person does not continue to be liable as a partner merely because of a failure to file a statement of dissociation or to amend a statement of partnership authority to indicate the partner's dissociation from the partnership.

(E) except as otherwise provided in subsections A and B, persons who are not partners to each other are not liable as partners to other persons.

**Virginia Code Section 59.1-69(A):**

(A) No person, partnership, limited liability company or corporation shall conduct or transact business in this Commonwealth under any assumed or fictitious name unless such person, partnership, limited liability company or corporation shall sign and acknowledge a certificate setting forth the name under which such business is to be conducted or transacted, and the names of each person, partnership, limited liability company or corporation owning the same, with their respective post-office and residence addresses...and file the same in the office of the clerk of the court in which deeds are recorded in the county or city wherein the business is to be conducted.

**Virginia Code Section 59.1-70(A):**

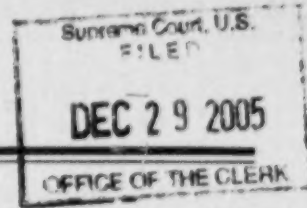
When business is conducted in this Commonwealth under an assumed or fictitious name by...a limited liability company..., such limited liability



52a

company...shall file in the office of the clerk of the State Corporate Commission a copy of the certificate described in Section 59.1-69, duly attested by the clerk of the court in which the original is on file....

No. 05-693



IN THE  
**Supreme Court of the United States**

STEPHEN V. CRAIG AND UN SUN H. CRAIG,

*Petitioners,*

v.

BASHEER & EDGEMOORE, *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF VIRGINIA

**BRIEF IN OPPOSITION**

WILLIAM T. FREYVOGEL  
MATSON FREYVOGEL PC  
8200 Greensboro Drive  
Suite 325  
McLean, VA 22102  
(703) 448-6600

*Counsel for Respondents*



## **QUESTIONS PRESENTED**

1. Does the Supreme Court of the United States have jurisdiction to review this civil, state law matter, when Petitioners have failed to present a federal issue in any of the state court proceedings?

2. Did the Circuit Court of Fairfax County, Virginia, as affirmed by the Supreme Court of Virginia, properly hold, on four separate occasions, that Petitioners failed to state claims upon which relief could be granted, based upon the express language of a contract between Petitioners and Basheer/Edgemoore-Southampton, L.L.C. and based upon clear tenets of Virginia law?

**CORPORATE DISCLOSURE STATEMENT**

None of the corporate Respondents have a parent company and no publicly held corporation owns 10% or more of the stock of any such Respondent.

# TABLE OF CONTENTS

	<i>Page</i>
QUESTIONS PRESENTED .....	i
CORPORATE DISCLOSURE STATEMENT .....	ii
TABLE OF CONTENTS .....	iii
TABLE OF AUTHORITIES .....	v
STATEMENT OF THE CASE .....	1
REASONS FOR DENYING THE PETITION .....	5
1. Mr. and Mrs. Craig have not presented a proper claim under 28 U.S.C.A. § 1257(a) in that they have failed to present their federal claim to the state court that rendered the decision they wish to have reviewed. ....	5
2. In sustaining the Demurrer related to the alleged "partnership" among the Defendants, the Trial Court, as affirmed by the Supreme Court of Virginia, properly considered the express language of the Agreement between Mr. and Mrs. Craig and Southampton, attached to the Amended Motion for Judgment as Exhibit 1.. ....	9

*Contents*

	<i>Page</i>
3. In sustaining the Demurrer related to all fraud-related claims, the Trial Court, as affirmed by the Supreme Court of Virginia, properly relied on the valid and enforceable merger clause in the Agreement, on the economic loss rule and on Mr. and Mrs. Craig's improper allegations regarding misrepresentations related to future performance and statements of opinion.. . .	15
CONCLUSION .....	23



## TABLE OF CITED AUTHORITIES

	<i>Page</i>
<b>Cases:</b>	
<i>Adams v. Robertson</i> , 520 U.S. 83 (1997) .....	6, 7
<i>Ames v. American National Bank</i> , 163 Va. 1, 176 S.E. 204 (1934) .....	11, 14
<i>Bankers Life &amp; Casualty Co. v. Crenshaw</i> , 486 U.S. 71 (1988) .....	7
<i>Blair Construction, Inc. v. Weatherford</i> , 253 Va. 343, 485 S.E.2d 137 (1997) .....	20
<i>Board of Directors of Rotary Int'l v. Rotary Club of Duarte</i> , 481 U.S. 537 (1987) .....	6
<i>Bouie v. City of Columbia</i> , 378 U.S. 347 (1964) ...	5, 8
<i>Bowman v. State Bank of Keysville</i> , 229 Va. 534, 331 S.E.2d 797 (1985) ..	10
<i>Brooks v. Bankson</i> , 248 Va. 197, 204, 445 S.E.2d 473 (1994) .....	17
<i>CaterCorp, Inc. v. Catering, Inc.</i> , 246 Va. 22, 431 S.E.2d 277 (1993) .....	10
<i>Christopher Associates, L.P. v. Sessoms</i> , 245 Va. 18, 425 S.E.2d 795 (1993) .....	17

## Cited Authorities

	<i>Page</i>
<i>Commercial Construction Specialties, Inc. v. ACM Construction Management Corp.</i> , 242 Va. 102, 405 S.E.2d 852 (1991) .....	10-11, 14
<i>Dade v. Anderson</i> , 247 Va. 3, 439 S.E.2d 353 (1994) .....	10
<i>Filak v. George</i> , 267 Va. 612, 594 S.E.2d 610 (2004) .....	19
<i>Flippo v. F&amp;L Land Co.</i> , 241 Va. 15, 400 S.E.2d 156 (1991) .....	10
<i>Foods First, Inc. v. Gables Associates</i> , 244 Va. 180, 418 S.E.2d 888 (1992) .....	17
<i>Foreign Mission Board v. Wade</i> , 242 Va. 234, 409 S.E.2d 144 (1991) .....	18
<i>Fox v. Custis</i> , 236 Va. 69, 372 S.E.2d 373 (1988) ...	11, 14
<i>Fun v. Virginia Military Institute</i> , 245 Va. 249, 427 S.E.2d 181 (1993) .....	10, 13
<i>Gregory v. Peoples</i> , 80 Va. 355 (1885) .....	20
<i>Hechler Chevrolet, Inc. v. General Motors Corp.</i> , 230 Va. 396, 337 S.E.2d 744 (1985) .....	13
<i>Illinois v. Gates</i> , 462 U.S. 213, 103 S. Ct. 2317 (1983) .....	7

## Cited Authorities

	<i>Page</i>
<i>Lambert v. Downtown Garage, Inc.</i> , 262 Va. 707, 553 S.E.2d 714 (2001) .....	21
<i>McMillion v. Dryvit Systems, Inc.</i> , 262 Va. 463, 553 S.E.2d 364 (2001) .....	21, 22-22
<i>Meridian Title Insurance Co. v. Lilly Homes, Inc.</i> <i>et al.</i> , 735 F. Supp. 182 (E.D. Va. 1990) .....	20
<i>Mortarino v. Consultant Engineering Services, Inc.</i> , 251 Va. 289, 467 S.E.2d 778 (1996) .....	20, 21, 22
<i>Nationwide Mt. Ins. Co. v. Hargraves</i> , 242 Va. 88, 405 S.E.2d 848 (1991) .....	20
<i>Palumbo v. Bennett</i> , 242 Va. 248, 409 S.E.2d 152 (1991) .....	10
<i>Patrick v. Summers</i> , 235 Va. 452, 269 S.E.2d 162 (1988) .....	21
<i>Penick v. Dekker</i> , 228 Va. 161, 319 S.E.2d 760 (1984) .....	10
<i>Richmond Metropolitan Authority v. McDevitt Street Bovis, Inc.</i> , 256 Va. 553, 507 S.E.2d 344 (1998) .....	18
<i>Rosillo v. Winters</i> , 235 Va. 268, 367 S.E.2d 717 (1988) .....	10

## Cited Authorities

	<i>Page</i>
<i>Ross v. Craw</i> , 231 Va. 206, 343 S.E.2d 312 (1986) .....	17
<i>Soble v. Herman</i> , 175 Va. 489, 9 S.E.2d 459 (1940) .....	21
<i>Spence v. Norfolk &amp; W. R.R. Co.</i> , 92 Va. 102, 22 S.E. 815 (1895) .....	18-19
<i>Tuscarora, Inc. v. B.V.A. Credit Corporation, et al.</i> , 218 Va. 849, 241 S.E.2d 778 (1978) .....	20, 21
<i>W.F. Magann Corp. v. Virginia-Carolina Electrical Works, Inc.</i> , 203 Va. 259, 123 S.E.2d 377 (1962) .....	17
<i>Ward's Equipment, Inc. v. New Holland North America, Inc.</i> , 254 Va. 379, 493 S.E.2d 516 (1997) .....	10, 12, 13
<i>Webb v. Webb</i> , 451 U.S. 493 (1981) .....	6, 7
<i>Welfley v. Shenandoah Iron, et al.</i> , 83 Va. 768, 3 S.E. 376 (1887) .....	20
<i>Wilson v. Holyfield</i> , 227 Va. 184, 313 S.E.2d 396 (1984) .....	17
<i>Winn v. Aleda Construction Co.</i> , 227 Va. 304, 315 S.E.2d 193 (1984) .....	17, 20

*Cited Authorities*

*Page*

**Statutes:**

28 U.S.C.A. § 1257(a) ..... 5, 6, 7, 8

Virginia Code § 8.01-279 ..... 9

## STATEMENT OF THE CASE

As an initial matter, it must be noted that Respondents disagree with and contest virtually all of the factual allegations made by Petitioners, Stephen and Un Sun Craig ("Mr. and Mrs. Craig"), in their Petition for Writ of Certiorari ("Petition"), except as set forth herein. These allegations are mere self-serving conjecture which have never been introduced as evidence in any court of law.

Mr. and Mrs. Craig filed their initial Motion for Judgment in the Circuit Court of Fairfax County ("Trial Court") on or about October 24, 2002 ("Original Litigation"), arising from the purchase and sale of a lot and a new home located at 7545 Laurel Creek Court, Springfield, Virginia 22150, in the Southampton subdivision ("Property"), and memorialized by the terms and conditions of a Purchase and Sale Agreement ("Agreement"), dated May 20, 2000, between Mr. and Mrs. Craig and Appellee, Basheer/Edgemoore-Southampton, L.L.C. ("Southampton"). The opening sentence of the Agreement expressly provided:

By this Agreement, made this May 20, 2000, by and between Basheer/Edgemoore-Southampton, L.L.C., trading as Basheer & Edgemoore, (hereinafter referred to as "Seller"), and Stephen V. and Un Sun H. Craig (hereinafter referred to as "Purchaser"), . . .

(Emphasis added.) The Agreement clearly identified Mr. and Mrs. Craig as "Purchaser", Southampton as "Seller" and "Basheer & Edgemoore" as a mere trade name for Southampton.



Furthermore, paragraph 7 of the Agreement states, in capitalized print:

**SELLER AGREES TO PROVIDE PURCHASER  
A ONE YEAR LIMITED WARRANTY (THE  
"HOME WARRANTY").**

This express warranty obligation ("Warranty") clearly belonged to Southampton, as "Seller", and was provided to Mr. and Mrs. Craig at closing.

Mr. and Mrs. Craig closed on the purchase of the Property on or about May 7, 2001, for a purchase price of \$610,833. Pursuant to the terms and conditions of the Warranty, Southampton performed repair work on the Property through May 2002. Mr. and Mrs. Craig continued to make demands on Southampton for additional warranty work, outside of the scope of the Warranty, after May 2002. On October 24, 2002, Mr. and Mrs. Craig filed their Motion for Judgment in the Original Litigation.

In the Original Litigation, Mr. and Mrs. Craig sued numerous parties, including Diane Cox Basheer, personally, the President of Diane Cox Basheer Communities, Inc. ("Basheer Communities"), for what was essentially a construction defect/warranty claim. On January 31, 2003, the Trial Court sustained the original Defendants' Demurrer and granted Mr. and Mrs. Craig leave to amend their Motion for Judgment. The Defendants in the Original Litigation filed a Demurrer to the Amended Motion for Judgment, which again was sustained in part by the Trial Court. On or about September 24, 2003, shortly before trial and a motions hearing on Defendants' Motions in Limine, Mr. and Mrs. Craig non-suited the Original Litigation.